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No. 17-6155

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TENNESSEE CLEAN WATER NETWORK;
TENNESSEE SCENIC RIVERS ASSOCIATION

Plaintiffs-Appellees,

v.

TENNESSEE VALLEY AUTHORITY,

Defendant-Appellant.

On Appeal from the United States District Court for the
Middle District of Tennessee, Nashville Division

TENNESSEE VALLEY AUTHORITY'S RESPONSE IN OPPOSITION TO PETITION FOR REHEARING EN BANC

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INTRODUCTION

The petition for rehearing en banc should be denied. The panel's interpretation of the Clean Water Act ("CWA") is faithful to statutory text; poses no conflict with any decision of this Court or the Supreme Court; and agrees with the only other circuit to address CWA liability (and reject it) for coal ash leachate that seeps diffusely through groundwater into navigable waters.[1]

Like the Seventh and Fifth Circuits before it,[2] the panel respected the line Congress drew between point source and nonpoint source pollution by rejecting the hydrological connection theory of CWA liability. Although the Ninth and Fourth Circuits have recently broken ranks with these precedents, those decisions involved undisputed point source discharges, not diffuse migration of coal ash leachate from Coal Combustion Residual ("CCR") facilities.[3] Since then, the Fourth Circuit has distinguished the CCR context, refusing to impose CWA liability in circumstances

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[1] The panel decision here is intertwined with and draws extensively from *Ky. Waterways v. Ky. Utilities Co.*, 905 F.3d 925 (6th Cir. 2018), *pet. reh'g en banc denied* (Nov. 26, 2018). Because the companion decision remains on the books, granting rehearing here would be tantamount to a *de facto* rehearing of *Ky. Waterways*, which would be unfair to the *Ky. Waterways* parties who have had no opportunity to present their views on whether the CWA issue should be reheard.

[2] *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994); *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001).

[3] *Haw. Wildlife Fund v. Cnty. of Maui*, 886 F.3d 737 (9th Cir. 2018), *pet. for cert. filed* (U.S. Aug. 27, 2018) (No. 18-260); *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018), *pet. for cert. filed* (U.S. Aug. 28, 2018) (No. 18-268).

indistinguishable from this case. *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403 (4th Cir. 2018).

As the panel and the Fourth Circuit both recognized, groundwater pollution from CCR leachate is governed not by the CWA but by the RCRA/CCR Rule framework.[4] This leaves no regulatory loophole. Under this framework, TVA is working with Tennessee regulators to protect against groundwater pollution and towards closure of those CCR facilities that are still operating at Gallatin.

Because the panel decision correctly applied the language of the statute and governing precedent and because even the supposedly "split" Fourth Circuit agrees that RCRA/CCR Rule—not the CWA—supplies the appropriate statutory framework for regulating groundwater migration of coal ash leachate, the stringent standards for en banc review are not satisfied. Nor is Petitioner's disagreement with interpretation of state regulatory provisions in a now-expired NPDES permit a matter worthy of rehearing en banc. The petition must therefore be denied.

ARGUMENT

I. Consistent with Governing Precedent, the Panel Correctly Held that the CWA Forecloses the Hydrological Connection Theory.

The panel reversed the district court's holding that TVA could be liable for CWA violations if its Gallatin coal ash storage sites "leak[] pollutants through

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[4] Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901; CCR Rule, 80 Fed. Reg. 21,302 (Apr. 17, 2015).

groundwater that is 'hydrologically connected' to the Cumberland River without a permit." *Tenn. Clean Water Network v. TVA*, 905 F.3d 436, 438 (6th Cir. 2018) ("*TCWN*"). "[A]ny alleged leakages into the groundwater are not a violation of the CWA," the panel held, because the CWA requires that "the pollutant must make its way to a navigable water...by virtue of a point source conveyance." *Id.* at 444. Here, "when the pollutants are discharged to the river, they are not coming *from* a point source; they are coming from groundwater which is a nonpoint-source conveyance." *Id.*

The panel, like other circuits, adhered to the CWA's text and followed precedent requiring that a point source "convey the pollutant to 'navigable waters.'" *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004). The CWA "makes clear that some facility must be involved that functions as a discrete, not generalized, 'conveyance,'" which must "produce[] the discharge at issue." *Va. Elec.*, 903 F.3d at 410-11; *accord Simsbury-Avon Pres. Club, Inc. v. Metacon Gun Club, Inc.*, 575 F.3d 199, 224 (2nd Cir. 2009) ("[A] point source discharge requires that pollutants reach navigable waters by a 'discernible, confined and discrete conveyance.'"); *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 44-45 (5th Cir. 1980) (The conveyance must "be the means by which pollutants are ultimately deposited into a navigable body of water.").

And the panel followed this Court's framework, grounded in the statutory text, for analyzing CWA claims: "'(1) a *pollutant* must be (2) *added* (3) *to navigable waters* (4) *from* (5) *a point source*.'" *TCWN*, 905 F.3d at 439 (quoting *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 583 (6th Cir. 1988)). "[A]ll other forms of pollution are considered nonpoint-source pollution and are within the states' regulatory domain." *Id.* (citing *Consumers Power*). This point source/nonpoint source distinction is the "organizational paradigm of the Act," *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 550 F.3d 778, 780 (9th Cir. 2008), and draws a regulatory bright line to preserve the federal-state balance mandated by the CWA. *TCWN*, 905 F.3d at 439 (citing 33 U.S.C. § 1251(b)).

Also firmly grounded in precedent is the panel's determination that diffuse groundwater flows are incompatible with point source "effluent limitations," 33 U.S.C. § 1362(11), which are "the heart of the CWA's regulatory power." *TCWN*, 905 F.3d at 442; *Ky. Waterways*, 905 F.3d at 933-34. Point source effluent limitations and the NPDES program, as the "means of achieving and enforcing th[ose] effluent limitations," were the principal methods Congress introduced in the CWA "to set and enforce standards to abate and control water pollution." *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 204-05 (1976). But such limitations "[are] virtually impossible" to measure when the discharge is "not the product of a discrete conveyance." *Va. Elec.*, 903 F.3d at 411. Thus, labeling the

effluent limitation scheme "irrelevant," *TCWN*, 905 F.3d at 451 (Clay, J., dissenting), ignores the CWA's "'central regulatory point.'" *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.25 (1977) (quoting 118 Cong. Rec. 36777 (1972)).

Rapanos v. United States, 547 U.S. 715 (2006), which all panel members recognized as non-binding, provides no aid to Petitioners. It is a "plurality opinion answering an entirely different legal question...that says nothing of point-source-to-nonpoint-source dumping like that at issue here." *TCWN*, 905 F.3d at 444-45. And because *Rapanos* "*limited* the scope of the CWA by interpreting the phrase 'navigable waters' narrowly," *Ky. Waterways*, 905 F.3d at 936 n.9, it does not support the atextual expansion of CWA jurisdiction urged by Petitioners.

The panel rightly concluded that accepting Petitioners' hydrological connection theory "would disrupt the existing regulatory framework" under RCRA, 42 U.S.C. § 6903(27), because "RCRA explicitly exempts from its coverage" point source discharges. *TCWN*, 905 F.3d at 445. This poses no conflict with *United States v. Dean*, which did not address groundwater and recognized that, because point source discharges "into surface waters" are governed by the CWA, they are exempt from RCRA. 969 F.2d 187, 194 (6th Cir. 1992). The panel said the same thing: "while coal ash is stored and treated in the coal ash ponds, RCRA governs; once the ash pond wastewater is discharged by way of a point source to navigable waters, the

CWA kicks in. And when a discharge requires an NPDES permit, it is expressly excluded from RCRA's coverage." *Ky. Waterways*, 905 F.3d at 929.[5]

There is thus no intra-circuit conflict. And Petitioners' distorted view of the statutory interplay between the CWA and RCRA would have perverse consequences. Tennessee regulates the heavily-forested NRS[6] as a "'closed dry ash disposal area'" under its solid waste program, "includ[ing] ongoing groundwater monitoring." *TCWN*, 905 F.3d at 439. Tennessee is currently enforcing alleged groundwater violations of its solid waste statute at the NRS. *Id.* at 441 & n.3. But the only possible source of Tennessee's authority to regulate the NRS under its solid waste program is RCRA. 42 U.S.C. § 6961(a). Consistent with this Court's precedents, the panel rightly rejected Petitioners' "proposed CWA reading [as] problematic" because it would "remove from RCRA's coverage" groundwater regulation at Gallatin's CCR sites. *TCWN*, 905 F.3d at 445.

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[5] *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927 (6th Cir. 2009), likewise poses no conflict. It addressed the distinct question of whether chemical pesticide residuals were point source discharges. *Id.* at 938. Although disputing which types of discharges should be covered, "EPA and the courts agree[d]" that the "pesticides are applied by point sources." *Id.* at 939. Here, the panel found the opposite: "the pollutants are not coming *from* a point source; they are coming from groundwater which is a nonpoint-source conveyance." *TCWN*, 905 F.3d at 444-45. *Peconic Baykeeper, Inc. v. Suffolk Cnty.*, 600 F.3d 180 (2d Cir. 2010), also involved sprayers that were undisputed point sources.

[6] (TVA Br.,Doc.31,PageID#22 (drone video image of the NRS).)

Hence, just because groundwater pollution "falls outside the scope of" CWA regulation does not mean "that it slips through the regulatory cracks." *Va. Elec.*, 903 F.3d at 411. On the contrary, the CCR Rule provides the "framework envisioned by Congress…to address the problem of groundwater contamination caused by coal ash impoundments." *TCWN*, 905 F.3d at 446. The panel "decline[d] to interpret the CWA in a way that would effectively nullify the CCR Rule and large portions of RCRA." *TCWN*, 905 F.3d at 446. Like *Consumers Power Co.*, 862 F.2d at 590, which harmonized the CWA and the Federal Power Act for regulation of hydroelectric facilities, the panel here *avoided* a regulatory gap by refusing to blur Congress's line between point source and nonpoint source pollution.

II. The Panel Decision Did Not *Create* a Circuit Split.

Petitioners not only strain to manufacture a non-existent intra-circuit split, they wrongly assert that, "[u]ntil the panel decision, every circuit court that had considered the issue" held that the CWA "applies to indirect discharges that reach surface water via groundwater." (Pet.,Doc.96,PageID#15).

The Seventh and the Fifth Circuits, in rulings not cited by Petitioners, have squarely rejected the hydrologic connection theory. *Oconomowoc* held that the CWA does not "assert[] authority over ground waters, just because these may be hydrologically connected with surface waters," and recognized that the omission of groundwater "is not an oversight" but rather evidence of Congress's decision "to

leave the subject to state law." 24 F.3d at 965.[7] Likewise, *Rice* rejected the theory "that a discharge onto dry land, some of which eventually reaches groundwater and some of the latter of which still later may reach navigable waters, all by gradual, natural seepage, is the equivalent of a 'discharge' 'into or upon the navigable waters.'" 250 F.3d at 271.

The panel decision also is consistent with the only other circuit court precedent addressing leachate from CCR sites. The Fourth Circuit recently held that leachate from CCR facilities "carried by groundwater into navigable waters" does not violate the CWA's prohibition of unpermitted point source discharges because CCR sites are not point sources. *Va. Elec.*, 903 F.3d at 410-13. While basing its decision on other grounds, the panel agreed with this reasoning. *TCWN*, 905 F.3d at 442-43 & n.6; *Ky. Waterways*, 905 F.3d at 934 n.8 ("Coal ash ponds are not conveyances."). Like *Va. Elec.*, the panel recognized that "the CCR Rule, not the CWA, is the framework…to address the problem of groundwater contamination caused by coal ash impoundments." *TCWN*, 905 F.3d at 446.

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[7] Just this month, a Seventh Circuit district court found *Oconomowoc* "directly applicable" to CCR sites and held that "[d]ischarges from [coal ash] ponds into groundwater are not covered by the CWA, even if there is an alleged hydrological connection between groundwater and…'navigable waters.'" *Prairie Rivers Network v. Dynegy Midwest Gen., LLC*, No. 18-CV-2148, 2018 WL 6042805, at *6 (C.D. Ill. Nov. 14, 2018).

Although two circuits in non-CCR cases involving undisputed point sources recently have expanded CWA liability to cover groundwater migration in the unique circumstances of those cases, *Upstate Forever*, 887 F.3d 637, and *Haw. Wildlife Fund*, 886 F.3d 737, these decisions are of no help to Petitioners. Their competing atextual and factbound standards for CWA liability are not even satisfied on the facts found here.[8] And the Fourth Circuit has already distinguished *Upstate Forever*, ruling that coal ash storage sites, like Gallatin's, are not "point sources as defined in the [CWA]." *Va. Elec.*, 903 F.3d at 411.[9]

More fundamentally, any academic disagreement with "sister circuits" on the hydrological connection question, *Ky. Waterways*, 905 F.3d at 933, does not warrant en banc rehearing, particularly when certiorari is pending in both cases.[10] And because the panel decision here "simply join[ed] one side of an already existing conflict," rehearing en banc is "not as important because it cannot avoid the conflict." Fed. R. App. P. 35(b) advisory committee's note (1998).

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[8] Here, there was no proof of "fairly traceable" pollutants exceeding *de minimis* levels reaching the Cumberland River, much less "measurable quantities" of traceable pollutants. (*See* TVAReplyBr.,Doc.83,PageID##9,23-24.)

[9] *Haw. Wildlife Fund* and *Upstate Forever* do not "flow from a long line" of appellate decisions holding the CWA applicable to groundwater migration (*contra* Pet.,Doc.96,PageID##15-16). None of the cases addressed CWA coverage of groundwater migration, much less the specific issue of coal ash leachate.

[10] Both petitions are scheduled to be considered on November 30, 2018. *Supra* n.3.

III. The Panel's Correct Interpretation of an Expired State NPDES Permit is Not Worthy of En Banc Review.

The NPDES permit here expired on May 1, 2017, and has been replaced by a renewed permit. *TCWN*, 905 F.3d at 440 n.2. Petitioners recognize that these expired permit provisions have been modified by the new permit (Pet.,Doc.96,PageID##20 n.4,22n.7), and thus, superseded. Alleged errors in interpreting state law do not merit rehearing, 6th Cir. I.O.P. 35(a), particularly when state regulators "deemed TVA in compliance with the Permit" in both 2014 and 2016, *TCWN*, 905 F.3d at 440.[11]

Nor did the panel stray from precedent in interpreting these state law provisions. The panel correctly applied "traditional contract interpretation principles," including "enforce[ment of] the terms as written." *Gallo v. Moen, Inc.*, 813 F.3d 265, 269 (6th Cir. 2016); *accord TCWN*, 905 F.3d at 446-47 (enforcing "the plain language of these two provisions"). This Court's precedents require nothing more.

CONCLUSION

The petition for rehearing en banc should be denied.

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[11] As Petitioners concede (Pet.,Doc.96,PageID##18,22), the permit provisions implement state regulations. *See generally* Tenn. Comp. R. & Regs. 0400-40-05-.07 (permit terms and conditions). At least one circuit has concluded that "state regulations…are not enforceable through a [CWA] citizen suit." *Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 359 (2d Cir. 1993).

Respectfully submitted,

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Have a nice weekend.

David

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CASE NO. 17-6155

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TENNESSEE CLEAN WATER NETWORK
AND TENNESSEE SCENIC RIVERS ASSOCIATION,
Plaintiffs-Appellees,
v.
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Defendant-Appellant.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF OF PLAINTIFFS-APPELLEES TENNESSEE CLEAN WATER NETWORK AND TENNESSEE SCENIC RIVERS ASSOCIATION

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FOR THE SIXTH CIRCUIT

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Plaintiffs-Appellees,	)	**CASE NO. 17-6155**
v.	)	
TENNESSEE VALLEY AUTHORITY,	)	
Defendant-Appellant.	)	

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to Rule 26.1 of the Rules of the Sixth Circuit Court of Appeals, plaintiff-appellee, Tennessee Clean Water Network, makes the following disclosure:

1. Are said parties subsidiaries or affiliates of a publicly owned corporation? No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No.

/s/ Michael S. Kelley

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TENNESSEE CLEAN WATER NETWORK AND TENNESSEE SCENIC RIVERS ASSOCIATION,	)	
Plaintiffs-Appellees,	)	**CASE NO. 17-6155**
v.	)	
TENNESSEE VALLEY AUTHORITY,	)	
Defendant-Appellant.	)	

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to Rule 26.1 of the Rules of the Sixth Circuit Court of Appeals, plaintiff-appellee, Tennessee Scenic Rivers Association, makes the following disclosure:

1. Are said parties subsidiaries or affiliates of a publicly owned corporation? No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No.

/s/ Anne E. Passino

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STATEMENT REQUESTING ORAL ARGUMENT

Plaintiffs-Appellees respectfully request oral argument. This appeal involves violations of the Clean Water Act, 33 U.S.C. §§ 1251–1376, and a National Pollutant Discharge Elimination System Permit. Plaintiffs-Appellees believe this Court would benefit from the opportunity to pose questions during oral argument because of the important clean water protections at issue in the case.

STATEMENT OF ISSUES

1. Whether TVA's Ash Pond Complex and Non-Registered Site are point sources under the Clean Water Act.

2. Whether an unpermitted discharge of pollutants from a point source to jurisdictional surface waters, through groundwater with a direct hydrologic connection to those surface waters, violates the Clean Water Act.

3. Whether TVA violated the terms of its NPDES permit governing "removed substances" and discharges other than through permitted outfalls.

4. Whether TVA failed to meet its burden of proof to invoke a "permit-shield" defense for its discharges of pollutants through unauthorized seeps and leaks.

5. Whether the district court properly exercised its discretion in ordering TVA to excavate its stored coal ash and relocate it "to a lined impoundment with no significant risk of discharge into the waters of the States."

STATEMENT OF THE CASE

For decades, the Tennessee Valley Authority has violated the Clean Water Act ("CWA") at its Gallatin Fossil Plant by discharging pollutants from two unlined coal ash impoundments into the Cumberland River through seeps, fissures, and sinkholes. TVA built its active coal ash impoundment on limestone bedrock riddled with natural conduits that flow to the adjacent river. It abandoned its inactive coal ash impoundment decades ago, without addressing the contamination resulting from leaks into the river. Trial evidence proved heavy metals and other toxic pollutants have been found throughout the plant site and in the river.

Because TVA's coal ash waste is saturated by groundwater in leaking impoundments built on porous ground, it will continue to pollute the river until it is excavated. TVA proposes to cover the ash and leave it in unlined pits along the riverfront. Based on the striking facts of the Gallatin site, the district court found that remedy ineffective to cure TVA's violations. The court ordered TVA to remove the coal ash to a lined landfill.

That remedy is both necessary and reasonable. The Tennessee Department of Environment and Conservation ("TDEC") also concluded from scientific data that the ash should be excavated to a new, lined landfill on-site. In other states, utilities are excavating coal ash from dozens of similar impoundments.

The district court correctly exercised its equitable discretion to order the only remedy proven to stop TVA's illegal pollution, protect the river, and resolve "an untenable situation that has gone on for far too long."

STATEMENT OF FACTS

I. Gallatin Impoundments.

For more than 60 years, TVA has operated the Gallatin Plant on Odom's Bend Peninsula, upstream of Nashville and several smaller towns, on a part of the Cumberland River called Old Hickory Lake. Since the 1950s, Old Hickory Lake has been one of the most popular places in Middle Tennessee to boat, swim, fish, and hunt. (RE59-2,Reg.Man.,atPageID#1903;RE235,Tr.v.2,atPageID#9057:13-17).

The Gallatin Peninsula is characterized by karst geology, with limestone bedrock full of sinkholes, fissures, and conduits caused by water dissolving the limestone. (RE258,FF&CL,atPageID#10426-27,¶19;10432-33;¶48,51). TVA mixes its coal ash with water and sluices the slurry from its power plant to unlined impoundments, where the slurry is "treated" by allowing coal ash solids to settle. (RE235,Tr.v.2.,atPageID#9011:17-9012:2). Since 1970, TVA has accumulated this waste in its 389-acre Ash Pond Complex ("Complex")—a leaking, unlined impoundment comprising four ash ponds and three stilling ponds. The slurry travels through the Complex for treatment before wastewater is discharged from a

designated outfall. Before 1970, TVA sluiced ash to its 65-acre Non-Registered Site ("NRS"), where the ash remains today. (RE226,Jt.Stip.,atPageID#8325-26,¶7,¶14;RE236,Tr.v.3,atPageID#9323:5-6).

A. Ash Pond Complex.

When the Complex opened in 1970, it could not retain coal ash wastewater, which leaked into the river through the karst terrain. (RE86-9,Morris&Waldrop 1977,atPageID#2818-19; RE104-15,Young&Carden1978,atPageID#4164). For nearly a decade, TVA sent roughly 27 billion gallons of coal ash wastewater into the river through sinkholes before it partially repaired the impoundments. (RE258, FF&CL,atPageID#10437¶67;10490:313;-10526-27¶445;RE234,Tr.v.1,atPageID-#8777:23-8778:7).

The district court found, though TVA's litigation-driven assessments "tended to play up the uncertainty about the area's geological properties," historically "TVA was candid and unambiguous in its understanding of the extensive karst activity immediately below the Ash Pond Complex and its understanding that isolated repairs could not be expected to simply render those karst conditions a thing of the past." (RE258,FF&CL,atPageID#10525-26,¶441). For instance, the court cited TVA's 1977 report that "'the network of solution cavities and crevices in the groundwater system under the pond is extensive,'" and that "'plugging the presently leaking sinkholes would give no assurance that other sink holes would

not begin to leak.'" (*Id.*,citingRE86-8,Ungate1977,atPageID#2809)). "Most importantly," the court found, "the unanimous expert testimony is that sinkholes and other drainage features in karst terrain are not mere relics of some past geological event. Rather, the physical properties of the terrain itself make such area prone to the continued development of ever newer sinkholes or other karst features." (RE258,FF&CL,atPage-ID#10527,¶447).

TVA witnesses admitted that additional sinkholes were discovered in 2005 and 2010. (RE258,FF&CL,atPageID#10527,¶446). TDEC staff visited the site dozens of times in 2016 and observed karst features, including sinkholes and a "scarp" in Pond E. (RE258,FF&CL,atPageID#10475-76,¶¶240,242,244). The court also relied on data "showing substantial apparent voids [that] similarly support the inference that leaks through conduits, fissures, or other open areas are likely" under the Complex. (RE258,FF&CL,atPageID#10527,¶449).

TVA's Complex is a wastewater treatment facility under a National Pollution Discharge Elimination System ("NPDES") permit periodically renewed by TDEC, most recently in 2012. (RE226,Jt.Stip.,atPageID#8327,¶¶19-23;RE235,Tr.v.2,at PageID#9010:24-9012:2).[1] The permit authorizes TVA to discharge wastewater

[1] Several conservation groups appealed this and two other TVA NPDES permits. After six years of litigation, in 2016 the parties reached a global settlement whereby TVA agreed to implement stricter discharge standards for coal plants. (RE251-3,GlobalSettl.Agrt.). Rulings in the other cases narrowed the

from the Complex into the river at only one location, Outfall 001. (RE1-2,2012 Permit&Rationale,atPageID#58). TDEC technical staff testified that TVA disclosed no intention of discharging coal ash contaminants from the bottom of its impoundments through sinkholes or from seeps. (RE235,Tr.v.2,atPageID#9020:5-14). The schematic TVA provided to TDEC showed no such discharges. (RE1-1,Schematic,-atPageID#56). During the permitting process, several conservation groups expressed concerns about the potential for discharges from the *NRS* through seeps and leaks to groundwater, but not from the *Complex*. (App.v.1at16-17,JX150,RE238atPageID#9584;RE235,Tr.v.2,atPageID#9029:4-7).

Consistent with TVA's application, the permit does not authorize discharges through groundwater or seeps from the earthen dikes. In response to the catastrophic failure of a coal ash impoundment at TVA's Kingston plant, TDEC added seep-related terms to TVA's 2012 permit. (RE235,Tr.v.2,atPageID#9019:19-24;RE1-2,2012Permit&Rationale,atPageID#82). TDEC's "primary concern" with seeps is structural stability. (RE235,Tr.v.2,atPageID#9016:24-9017:3. ("TDEC … required detailed ongoing inspections of the structural condition of ash pond dikes")); (RE1-2,2012Permit&Rationale,PageID#83 (reporting related to "the

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issues, and Conservation Groups voluntarily dismissed several claims, including one related to seeps. *Cf.* (RE251-3,GlobalSettl.Agrt.atPageID#10265); (RE52-1,VoluntaryDis.,atPageID#1634). The settlement did not address the unpermitted discharges at issue in this litigation. (RE251-3,Global Settl.Agrt.;RE13-1, Am.Pet.).

structural integrity of the dike")). TDEC's staff testified that the permit did not allow any "discharges from seeps that would be discernible flow of water," and that "seepage per se is not authorized or identified in an NPDES permit." (RE258,FF&CL,atPageID#10455,¶144). Similarly, "[t]he discharge of wastewater or partially treated wastewater through a seep in a dike is not authorized in existing NPDES permits." (RE258,FF&CL,atPageID#10540,¶498). TDEC staff also testified that references to "seepage" in an addendum to the permit rationale did not modify the permit's actual terms. (RE258,FF&CL,atPageID#10453, ¶135; RE235,Tr.v.2,atPageID#9027:10-24).

Instead of *authorizing* seep discharges, the permit prohibits any "[s]ludge or any other material removed" by the Complex from causing "pollution of any surface or subsurface waters" ("removed-substances provision"). It also prohibits "discharge to land or water of wastes from any portion of the … treatment system." ("sewer-overflow provision") (RE1-2,2012Permit&Rationale,PageID#68,79), and requires remediation. (RE1-2,2012Permit&Rationale,PageID#83;RE235, Tr.v.2,atPageID#9041:22-25).

B. Non-Registered Site.

The NRS, which also abuts the river, stopped receiving ash in 1970. (RE226,Jt.Stip.,atPageID#8325-26,¶7). It does not operate as a wastewater-

treatment plant. TVA's permit does not cover, nor authorize discharge of any coal ash wastewater or other pollutants from, the NRS. (RE235,Tr.v.2,9029:15-18).

TVA's experts testified that some ash in the NRS sits in groundwater. (RE237,Tr.v.4,atPageID#9458:16-17 ("There are saturated conditions present within the coal ash in the non-registered site."); RE237,Tr.v.4,atPageID#9462:3-4;17-20 ("[T]he estimated volume of groundwater moving through the [NRS] is 9,490 cubic feet per day.")). TVA's engineering expert, Lang, testified seeps from the NRS continue discharging. (RE258,FF&CL,atPageID#10521,¶422; RE236, Tr.v.3,at-PageID#9281:19-24). The district court concluded that "it does appear more likely than not that some portions of the ponds penetrate the water table." (RE258,FF&CL,atPageID#10538,¶494).

II. TVA's Unlawful Discharges.

Conservation Groups' experts, analyzing testing from manual probes, conductivity, and discolored water and sediment, confirmed discharges from TVA's coal ash impoundments to the river. (RE258,FF&CL,atPageID#10442,¶90; 10458,¶160). Aerial photography revealed reddish-brown coloration indicative of coal ash beside the NRS. (RE258,FF&CL,atPageID#10450,¶120;App.v.1at 23,JX16,RE238atPageID#9577). Water-sampling results found "incriminating pollutant concentrations" near the Complex that were unlikely to come from "de minimis seeps." (RE258,FF&CL,atPageID#10530,¶460). Arsenic levels near the

shore of the Complex, for example, were 13 times the water-quality standard. (RE258,FF&CL,atPageID#10460,¶169). Samples "showed very high concentrations of boron and strontium," known indicators of coal ash pollution. (RE258,FF&CL,atPageID#10467,¶205). Conservation Groups' expert testified that selenium contamination is likely bioaccumulating in fish and causing toxicity in aquatic life. (RE258,FF&CL,atPageID#10469-10474,¶¶217-21,228-29,231-35). The full impact of TVA's contamination on aquatic life may be masked by fish stocking programs. (RE235,Tr.v.2atPageID#9149:13-9151:2;RE228-2,Lemly Test.,atPageID#8536-37,¶¶49-50).

The court reviewed evidence from which it concluded: the NRS is contaminated; it leaked in the past; there is "no evidence to suggest" it stopped; TVA's closure of the NRS was "insufficient to prevent infiltration of rainwater under currently prevailing standards[;] and that seeps from the [NRS] have continued." (RE258,FF&CL,atPageID#10520-10521,¶¶419-422).

Water sampling continued. (RE251,TVAStatusUpdate,atPageID#10256). TVA recently responded to TDEC's notice that arsenic exceedances near the Complex constitute illegal seep discharges. (Dec.6,2017TVALetter, http://environment-online.tn.gov:8080/pls/enf_reports/f?p=9034:34051:::NO:34051:P34051_PERMIT_NUMBER:TN0005428 (last visited Mar. 14, 2018)). *See* (RE251,TVAStatus

Update,atPageID#10252n2 (collecting cases regarding notice of records on TDEC website)).

III. Remedies at Gallatin.

The parties presented the court with two options for closing the impoundments: moving the ash to dry, lined storage ("clean closure"), advocated by Conservation Groups; or capping-in-place, advocated by TVA.

TVA's witness admitted that capping the unlined impoundments would not stop lateral flow of groundwater through the coal ash (RE258,FF&CL,atPageID #10482,¶¶277-78), and that ash is as much as 10 feet below the elevation of the river; therefore, "dewatering below river level would be virtually impossible (you cannot pump the river down)." (RE258,FF&CL,atPageID#10483,¶278 (citingApp.v.1at31,JX113,RE238atPage-ID#8730)). TVA's own consultants concluded that closure-in-place "would not yield a significant reduction in risk in the groundwater transition zone" at the NRS, and later recommended installing a liner beneath all TVA's ponds. (App.v.1at85,JX59,RE238atPageID#9579; RE234,Tr.v.1,atPage ID#8780:24-8781:13;RE16417,Stantec2009,atPageID#6708, 6714,6721).

The State of Tennessee informed the trial court that it prefers the coal ash be excavated and removed to an existing *on-site* landfill. (RE251-11,StateRedline,at PageID#10333). TVA's witness conceded that TVA had considered using the new,

on-site landfill to dispose of excavated ash. (RE258,FF&CL,atPageID#10481, ¶271). As TVA's witness admitted, other utilities have embraced clean closure. (RE258,FF&CL,atPageID#10482,¶273; *see also* RE236,Tr.v.3,atPageID#9302:13-9304:16 (South Carolina utilities plan to eliminate 100% of their unlined waterfront impoundments; Duke Energy plans to eliminate 10 unlined impoundment sites in North and South Carolina; and Georgia Power intends to eliminate 17 unlined impoundments)).

Because TVA's impoundments are unlined, karst underlies the Complex, and groundwater flows from the peninsula to the river, the district court concluded the only way to stop the pollution is to remove the ash. (RE258,FF&CL,atPageID #10539,¶496).

IV. Procedural History.

Two conservation groups whose members "use, paddle, fish in, enjoy, and otherwise live, work, and recreate on the portion of the Cumberland River in the vicinity of and downstream from the Gallatin Plant," (RE226,Jt.Stip,atPage ID#8327,¶25), notified TVA of their intent to enforce the CWA to stop TVA's unlawful pollution. (RE1-3to1-5,60DayNotice).

In response, in January 2015, TDEC filed an enforcement action against TVA in state court ("State Action") (RE13-5,StateCompl.), alleging TVA is violating state law and some provisions of its NPDES permit for the Complex.

(RE13-5,StateCompl.,atPageID#330-335). Conservation Groups intervened in the State Action. (RE13-7,Int.Order).

With TVA's agreement, the state court ordered TVA to study the extent of its contamination. (RE42-2,AgreedInjunction). The State Action remains pending, though TVA removed it to federal court in August 2017. (Notice of Removal, *State of Tenn. v. TVA*, 3:17-cv-01139, ECF No. 1 (M.D. Tenn. 2017)).

The district court here dismissed claims that overlapped with violations prosecuted by TDEC in the State Action. (RE139,Memo&Op,atPageID#5340-43; RE140,Order,atPageID#5369).

After years of discovery and a trial, the court entered judgment against TVA for four independent violations of the CWA: discharges through unpermitted seeps at the NRS; discharges of coal ash pollution to the river through groundwater from the Complex; and pollution that violates (a) the "removed-substances" and (b) "sewer-overflow" provisions of TVA's permit. Based on the evidence, the court concluded that capping the ash in place would not remedy the violations, (RE258, FF&CL,atPageID#10538,¶492-94), and ordered TVA to remove the ash to a lined landfill. (RE258,FF&CL,atPage ID#10541,¶501).

On June 6, 2017, the court ordered TVA to provide an update regarding the State Action with input from TDEC. (RE250,Jun.6Order). TDEC's comments to

the district court, filed with TVA's update,[2] confirm the State's preferred remedy is "removal of the Ash Pond Complex and Non-Registered Site into an expansion of the existing on-site permitted landfill." (RE251-11,StateRedline,atPageID#10332-10333).

STANDARD OF REVIEW

When reviewing a permanent injunction, "[f]actual findings are reviewed under the clearly erroneous standard, legal conclusions are reviewed de novo, and the scope of injunctive relief is reviewed for an abuse of discretion." *S. Cent. Power Co. v. Int'l Bhd. of Elec. Workers, Local 2359*, 186 F.3d 733, 737 (6th Cir. 1999). An abuse of discretion is a "definite and firm conviction that the district court committed a clear error of judgment." *Herman Miller, Inc. v. Palazzetti Imports & Exports, Inc.*, 270 F.3d 298, 317 (6th Cir. 2001). Consistent with these standards, this Court reviews remediation orders in CWA cases for abuse of discretion. *United States v. Cundiff*, 555 F.3d 200, 215 (6th Cir. 2009).

SUMMARY OF ARGUMENT

The district court found from credible, compelling evidence that TVA's Gallatin Fossil Plant is leaking pollutants into the Cumberland River from two coal ash impoundments, the Complex and the NRS. As discernible, confined, and

[2] TVA declined to incorporate TDEC's edits, instead attaching TDEC's redlined draft, which documents TDEC's position. (RE251,TVAStatusUpdate;RE251-11,StateRedline).

discrete containers used by TVA to collect its coal ash waste, both impoundments are "point sources" under the CWA. Because pollutants from these point sources are added to the river through groundwater with a direct hydrologic connection with the river, TVA is violating the CWA. The district court found the path through groundwater is "simple, clear and direct."

The NPDES permit authorizes TVA to discharge treated wastewater only from the Complex, and only through a single outfall. TVA violated its permit by discharging pollutants from seeps, sinkholes, and fissures beneath the Complex. The permit's plain language prohibits such discharges. TVA neither disclosed, applied for, nor obtained permission for discharges of coal ash wastewater, except through one outfall.

Evidence established that the impoundments continue to leak and cannot be adequately repaired, sending significant pollution into the river in violation of the permit and the CWA. The district court carefully balanced possible remedies and concluded that TVA must excavate and remove the coal ash to comply with the Act and the permit. It did not order excavation lightly. Although it is true that TVA's pollution is extensive and will be costly to remedy, the magnitude of the problem does not give TVA license to persist in polluting the river.

ARGUMENT

I. TVA Violated the Clean Water Act by Discharging Pollutants to the Cumberland River Through Groundwater.

The object of the CWA is to eliminate the discharge of pollutants into navigable waters to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. The "bedrock" of the CWA is its strict-liability standard. (RE258,FF&CL,PageID#10497-98,¶349 (citing *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 284 (6th Cir. 2015); 33 U.S.C. § 1311(a))).

Under this standard, "the discharge of any pollutant by any person shall be unlawful" without a permit. 33 U.S.C. § 1311(a). "[D]ischarge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). A "point source" is "any discernible, confined and discrete conveyance … from which pollutants are or may be discharged." *Id.* § 1362(14).

The district court found TVA liable for the unpermitted discharge of coal ash pollutants to the river from two point sources, the Complex and the NRS, through groundwater. The addition of pollutants to the river from those point sources without a permit is a straightforward violation of the CWA.

Because TVA is violating its NPDES permit, this Court should uphold the district court's remedy, regardless of whether the Court finds TVA is otherwise violating the Act.

A. The Ash Pond Complex and the Non-Registered Site Are Point Sources.

Congress "embrac[ed] the broadest possible definition" for point sources. *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979). "Any discernible, confined, and discrete conveyance" "from which pollutants are or may be discharged" qualifies "including, but not limited to" any "channel, tunnel, conduit, well, discrete fissure [or] container" among other statutory examples. 33 U.S.C. § 1362(14). Applying this broad statutory definition, the district court concluded that the Complex and the NRS are "discernible, confined, and discrete" point sources. (FF&CL,RE258,PageID#10511,¶385).

It is well-established that unlined coal ash impoundments from which pollutants are added to adjacent waterways are point sources. In *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas*, the court found that "surface impoundments designed to hold accumulated coal ash in the form of liquid waste" are "defined and discrete" point sources. 141 F. Supp. 3d 428, 443–44 (M.D.N.C. 2015). Similarly, in *Sierra Club v. Virginia Electric & Power Co.*, the court concluded that coal ash impoundments are point sources constructed "to concentrate coal ash, and its constituent pollutants, in one location," which "channels and conveys arsenic directly into the groundwater and thence into the surface waters." 247 F. Supp. 3d 753, 762–63 (E.D. Va. 2017).

These cases follow long-established precedent that industrial-waste impoundments that add pollutants to navigable waters are point sources. *See, e.g.*, *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 249–50 (4th Cir. 1979), *rev'd on other grounds sub nom EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64 (1980) (coal slurry ponds); *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980) (sediment basins); *Comm. to Save Mokelumne River v. E. Bay. Mun. Util. Dist.*, 13 F.3d 305, 308–09 (9th Cir. 1993) (mine runoff capture system); *Earth Sciences*, 599 F.2d at 374 ("sump pit"); *Residents Against Indus. Landfill Expansion v. Diversified Sys., Inc.*, 804 F. Supp. 1036, 1038 (E.D. Tenn. 1992) (sediment ponds collecting waste from landfill); *United States v. Alpha Nat. Res., Inc.*, No. 2:14-11609, 2014 WL 6686690, at *1 (S.D. W. Va. Nov. 26, 2014) (impoundments and settlement ponds).

TVA and its amici claim that a discrete source of pollutants from which pollutants are added to navigable waters is not a "point source." (6RE31,TVA,at PageID#39).[3] Under the Supreme Court's *Miccosukee* decision, they argue, a "point source" must be "the means by which the pollutants reach and are added to navigable waters." *See, e.g.* 6RE51,ChamberAmicus,atPageID#30. But this argument contradicts the statute, which prohibits "any addition of a pollutant *from*"

[3] Citations to the Sixth Circuit record are abbreviated as "6RE."

any point source; it does not only prohibit additions "*by*" a point source. 33 U.S.C. § 1362(12) (emphasis added).[4]

Miccosukee did not, as TVA contends, narrow the statutory definition of "point source" to exclude the actual source of pollutants. Rather, the Court confirmed that CWA point sources "*need not* be the original source of the pollutant," and that the statutory definition "*includes* within its reach point sources that do not themselves generate pollutants." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) (emphasis added). The Court did *not* insert into the CWA a requirement that the point source must add pollutants *directly* to navigable waters. Indeed, the Court in *Rapanos v. United States*, 547 U.S. 715 (2006) clarified there is no such requirement. *See infra* p. 23.

TVA's artificially narrow definition of "point source" would not even capture the examples Congress listed. The statute includes any "well," "container," "concentrated animal feeding operation," and "rolling stock," 33 U.S.C. § 1362(14)—none of which is necessarily the ultimate "means by which pollutants reach water" as TVA and its amici would require. (6RE51,Chamber AmicusPageID#30). Rather, each is a source from which pollutants can be added

[4] Even under TVA's erroneous interpretation of "point source," the district court's finding that discrete conveyances, conduits, and fractures in the karst geology underlying the Complex carry coal ash pollutants from the Complex to the river would sustain the court's finding of CWA liability.

to navigable waters. The Complex and NRS easily fit, for example, within the statute as "container[s]" for pollutants.

TVA's impoundments contrast sharply with non-point sources—like roads and utility poles—that "did nothing themselves to 'discretely collect[] and convey[]' the pollutants to a navigable water, and hence could not constitute 'point source[s]' under § 1362(14)." *Haw. Wildlife Fund v. Cty. of Maui,* 881 F.3d 754, 761 (9th Cir. 2018). Unlike impoundments, the runoff from such non-point sources is scattered and cannot "be traced to any identifiable point of discharge." *Id.* (citations omitted).

TVA argues for the first time on appeal that its impoundments are "subsurface excavations," and thus are non-point sources under 33 U.S.C. § 1314(f). (6RE31,TVA,atPageID#39). TVA has waived this argument. *See Armstrong v. City of Melvindale*, 432 F.3d 695, 700 (6th Cir. 2006). TVA has consistently described its facilities as "surface impoundments" in this litigation and appeal. (RE229-1,LangTestimony,atPageID#8564-65;6RE31,TVA,at PageID #46,47,72,73,n.36 ("[f]or CCR surface impoundments over 40 acres (such as the Complex"))). Furthermore, the list of "nonpoint sources" TVA cites in section 1314(f)(2)(F) "does not explicitly exempt [these] nonpoint pollution sources from the NPDES program if they *also* fall within the 'point source' definition." *Miccosukee*, 541 U.S. at 106.

Finally, TVA suggests the district court's ruling that *coal ash impoundments* are point sources should be reversed because *groundwater* is not a point source. But the district court did not hold, and Conservation Groups did not argue, that groundwater is a point source. Instead, the court traced pollutants in the river to adjacent coal ash impoundments—discrete containers where TVA collected the pollution that flows to surface waters through groundwater.

The authorities cited by TVA confirm this distinction. In *Sierra Club v. El Paso Gold Mines, Inc.*, e.g., Sierra Club alleged that a mine shaft, not groundwater, was a point source. 421 F.3d 1133, 1135 (10th Cir. 2005), *as corrected* (Oct. 21, 2005). The Tenth Circuit agreed and held that for a "discharge from a point source … which flows through other conveyances to navigable waters, CWA jurisdiction is established." *Id.* at 1141. Similarly, *Tri-Realty Co. v. Ursinus College*, cited by TVA, confirms that even a traditional non-point source like rainwater runoff "constitutes point source pollution within the meaning of the statute" when it "is collected or channeled by man." No. 11-5885, 2013 WL 6164092, at *8 (E.D. Pa. Nov. 21, 2013). The district court correctly found that the Complex and NRS are discrete point sources and traced pollution from those point sources to the river.

B. Evidence Proved TVA Added Coal Ash Pollutants to the Cumberland River Through Groundwater.

The court found compelling evidence that TVA is adding pollutants from point sources to the river through groundwater. The court considered the proximity of TVA's ash ponds to the river, karst formations beneath its unlined Complex impoundments, groundwater flow through its impoundments, and samples confirming coal ash contaminants in surface water, and concluded a direct hydrological connection between groundwater and the river was proven. It specifically noted that "the Ash Pond Complex is situated directly next to the shores of that river, arguably even on top of one of its former tributaries." (RE258,FF&CL,atPageID#10531,¶465). Pollutants travel a short distance to the river via groundwater through perforated karst limestone. Although "some groundwater takes a few unexpected detours on its way to the Cumberland, the water's general path is simple, clear, and direct." *Id.*

TVA's own evidence also confirmed groundwater on the peninsula flows to the river. (RE258,FF&CL,atPageID#10444-45,¶104;App.v.1at98,JX59,RE238at PageID#9579). *Cf.* (2017AnnualCCRRule GroundwaterMonitoring Report–Ash Pond Complex,at3,Fig.2&3, https://ccr.tva.gov/Plants/GAF/Surface%20Impoundment%20-%20Ash%20Pond%20E/Groundwater%20Monitoring/Annual%20Groundwater%20Report/257.90(e)_2017%20Annual%20GW%20Report_GAF_Ash%20Pond%20

E.pdf (last visited Mar. 15, 2018) (discussing injected dyes documenting groundwater rapidly flowing under the Complex and hydraulic gradients toward the river)); (6RE31,TVA,atPageID6#n.6).

C. The CWA Prohibits TVA's Discharges of Pollutants to the Cumberland River Through Groundwater.

The language of the CWA is unambiguous: a "discharge" is "any addition of any pollutant *to* navigable waters *from* any point source." 33 U.S.C. § 1362(12) (emphasis added). As Justice Scalia confirmed in *Rapanos*, "[t]he Act does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters,'" and courts "from the time of the CWA's enactment" have enforced the CWA "even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between." 547 U.S. at 743.

TVA effectively asks this Court to write "directly" into the definition of "discharge." To do so would gut the CWA, allowing polluters to discharge to navigable waters so long as they first run pollutants through groundwater. As the district court noted, "It would hardly make sense for the CWA to encompass a polluter who discharges pollutants via a pipe running from the factory directly to the riverbank, but not a polluter who dumps the same pollutants into a man-made settling basin some distance short of the river and then allows the pollutants to seep into the river via the groundwater." (RE258,FF&CL,atPageID#10503,¶361

(quoting *N. Cal. Riverwatch v. Mercer Fraser Co.*, No. C-04-4620 SC, 2005 WL 2122052, *2 (N.D. Cal. Sept. 1, 2005))).

The facts recently before the Ninth Circuit well illustrate the consequences of such a loophole. There, the County designed injection wells to dispose of pollutants beside the ocean, knowing that groundwater carried the pollutants a short distance to the ocean. *Haw. Wildlife Fund*, 881 F.3d at 758–59. The court concluded the CWA bars a polluter "from doing indirectly that which it cannot do directly" because any other result "would make a mockery of the CWA's prohibitions." *Id.* at 768.

The court unanimously rejected limiting the CWA to circumstances "where the point source itself directly feeds into the navigable water—e.g., via a pipe or a ditch." *Id.* at 764. Because the pollutants discharged to groundwater were "fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water," the CWA applied. *Id.* at 765.

Multiple circuit courts have reached the same conclusion. *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 515 (2d Cir. 2005) (embracing EPA's authority to regulate discharges "via groundwater"); *Quivira Mining Co. v. EPA*, 765 F.2d 126, 130 (10th Cir. 1985) (flows carrying pollutants "through underground aquifers ... into navigable-in-fact streams"); *U.S. Steel Corp. v. Train*, 556 F.2d 822, 852 (7th

Cir. 1977) (discharges through underground injection wells), *overruled on other grounds by City of W. Chi. v. U.S. Nuclear Regulatory Comm'n*, 701 F.2d 632, 644 (7th Cir. 1983). The overwhelming majority of district court decisions over four decades likewise affirm that the CWA applies to discharges of pollutants to surface waters via a groundwater connection.[5]

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[5] *Flint Riverkeeper, Inc. v. S. Mills, Inc.*, 276 F. Supp. 3d 1359, 1367 (M.D. Ga. 2017), *cert. denied*, 261 F. Supp. 3d 1345 (M.D. Ga. 2017); *Va. Elec. & Power Co.*, 247 F. Supp. 3d at 761; *Yadkin Riverkeeper*, 141 F. Supp. 3d at 445; *Ohio Valley Envtl. Coal. Inc. v. Pocahontas Land Corp.*, No. 3:14-11333, 2015 WL 2144905, at *8 (S.D. W. Va. May 7, 2015); *S.F. Herring Ass'n v. Pac. Gas & Elec. Co.*, 81 F. Supp. 3d 847, 863 (N.D. Cal. 2015); *Raritan Baykeeper, Inc. v. NL Indus., Inc.*, No. 09-CV-4117 (JAP), 2013 WL 103880, at *15 (D.N.J. Jan. 8, 2013); *Tenn. Riverkeeper, Inc. v. Hensley-Graves Holdings, LLC*, No. 2:13-CV-877-LSC, 2013 WL 12304022, at *5–6 (N.D. Ala. Aug. 20, 2013); *Ass'n Concerned Over Res. & Nature, Inc. v. Tenn. Aluminum Processors, Inc.*, No. 1:10-00084, 2011 WL 1357690, at *17 (M.D. Tenn. Apr. 11, 2011); *Greater Yellowstone Coal. v. Larson*, 641 F. Supp. 2d 1120, 1138 (D. Idaho 2009); *Nw. Envtl. Def. Ctr. v. Grabhorn, Inc.*, No. CV-08-548-ST, 2009 WL 3672895, at *11 (D. Or. Oct. 30, 2009); *Hernandez v. Esso Std. Oil Co. (P.R.)*, 599 F. Supp. 2d 175, 181 (D.P.R. 2009); *Coldani v. Hamm*, No. Civ. S-07-660 RRB EFB, 2007 WL 2345016, at *7 (E.D. Cal. Aug. 14, 2007); *N. Cal. Riverwatch*, 2005 WL 2122052, at *2; *Sierra Club v. El Paso Gold Mines, Inc.*, No. CIV.A.01 PC 2163 OES, 2002 WL 33932715, at *10 (D. Colo. Nov. 15, 2002); *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2001); *Mutual Life Ins. Co. v. Mobil Corp.*, No. Civ. A. 96-CV1781, 1998 WL 160820, at *3 (N.D.N.Y. Mar. 31, 1998); *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1319–20 (S.D. Iowa 1997); *Wash. Wilderness Coal. v. Hecla Mining Co.*, 870 F. Supp. 983, 990 (E.D. Wash. 1994); *Sierra Club v. Colo. Ref. Co.*, 838 F. Supp. 1428, 1434 (D. Colo. 1993); *McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182, 1195–96 (E.D. Cal. 1988), *vacated on other grounds sub nom McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325 (9th Cir. 1995); *New York v. United States*, 620 F. Supp. 374, 381 (E.D.N.Y. 1985); *O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp. 642, 647 (E.D. Pa. 1981).

These decisions are consistent with longstanding precedent applying the CWA to point-source pollution discharged to surface waters through intermediate conveyances, including overland flows and even through the air. *E.g.*, *Concerned Area Residents for the Env't v. Southview Farm,* 34 F.3d 114, 119 (2d Cir. 1994) ("[C]ollection of liquid manure into tankers and their discharge on fields from which the manure directly flows into navigable waters are point source discharges."); *Peconic Baykeeper, Inc. v. Suffolk Cty.*, 600 F.3d 180, 188–89 (2d Cir. 2010) (pesticides sprayed into water through air from trucks and helicopters); *Abston Constr.*, 620 F.2d at 45 ("Gravity flow … may be part of a point source discharge if [facility] at least initially collected or channeled the water and other materials."). Discharges to protected waters through underground flows are no different.

Against this overwhelming authority, TVA argues for a loophole in the CWA if pollutants pass even a short distance through groundwater before entering navigable waters, because Congress chose not to protect groundwater as a "water of the United States." (6RE31,TVA,atPageID#39). But no party has argued that the CWA protects groundwater as a water of the United States. The district court

did not find TVA liable for unpermitted discharges *to* groundwater, but for discharges to the river *through* groundwater. [6]

This case, like *Hawaii Wildlife Fund*, illustrates the loophole that would result if a short intermediate conveyance destroyed CWA jurisdiction over *sources* of pollutants. TVA built the Complex on karst terrain it knew was riddled with sinkholes and a "sinking creek" into which a stream submerged, flowing a short distance underground to the river. (RE258,FF&CL,atPageID#10526,¶443). Over seven years, TVA discharged 27 billion gallons of wastewater and coal ash into the river from the Complex through groundwater. (RE258,FF&CL,atPageID#10490, ¶313;10526-27,¶445). TVA's own engineers voiced concerns about karst terrain, fissures, and sinkholes to TVA management in the 1970s, and its outside consultants, not retained for this litigation, have done so in recent years. (RE258, FF&CL,atPageID#10525-26,¶441-44;RE164-17,Stantec2009,at PageID#6708, 6714,6721;RE163-2,Ungate1978,atPageID#6066;RE86-9,Morris&Waldrop1977, atPageID#2821). With full knowledge that the Complex is discharging coal ash

[6] The few cases cited by TVA make the same error, misconstruing Congress's choice to deny groundwater the protections afforded to "waters of the United States" as license to pollute protected surface waters *through* groundwater. *See Ky. Waterways All. v. Ky. Util. Co.*, No. 5:17-CV-292, 2017 WL 6628917, at *9 (E.D. Ky. Dec. 28, 2017); *Kelley v. United States*, 618 F. Supp. 1103, 1107 (W.D. Mich. 1985).

into the river through groundwater, TVA continues to dump coal ash into the Complex.

While Congress did not protect groundwater as a "water of the United States," it understood that surface water discharges *through* groundwater may be regulated by the CWA. In particular, the statutory definition of "point source" includes a "well." 33 U.S.C. § 1362(14). Pollutants discharged into groundwater through injection wells, like those at issue in *Hawaii Wildlife Fund*, can *only* reach surface waters through groundwater. *See U. S. Steel Corp. v. Train*, 556 F.2d at 852 (concluding CWA regulates "'pollutants' when injected into wells" in circumstances other than "'production of oil or gas'"). Congress's confirmation that such wells can be point sources reflects congressional intent that discharges *to* surface waters *through* groundwater are regulated by the CWA.

Congress has amended the CWA several times without refuting the courts' and EPA's approach to the statutory text. In fact, when Congress passed the Safe Drinking Water Act in 1977, it recognized that the CWA regulated discharges into deep water wells when there is an associated "discharge into navigable waters." H.R. Rep. No. 93-1185, at 6457 (1974).

Rejecting the plain language of the CWA and decades of consistent statutory interpretation, TVA and its amici describe a parade of horribles, claiming the district court's order will lead to federal regulation of all groundwater, drain the

budgets of state regulators, and defang solid waste laws. But there is no need to speculate about what *would* happen if the CWA regulated discharges through groundwater, because it always has.

The district court's ruling does not, as TVA and its amici contend, expose all groundwater to federal regulation under the CWA. (6RE31,TVA,atPageID#50). The district court recognized the CWA is not invoked by a "generalized assertion that covered surface waters will eventually be affected by remote, gradual, natural seepage from the contaminated groundwater." (RE258,PageID#10531, ¶464 (quoting *Rice v. Harken Exploration Co.*, 250 F.3d 264, 272 (5th Cir. 2001))). Rather, the court based its ruling on evidence of a "direct, traceable connection" through groundwater between the point source and the river. *Id.*

Applying the CWA to such discharges is neither "unworkable" nor novel, as TVA contends. (6RE31,TVA,atPageID#49). Congress tasked the courts with determining whether "any addition of any pollutant to navigable waters" originated "from any point source." 33 U.S.C. § 1362(12). That determination is well within their fact-finding capacity, and courts have no difficulty distinguishing between point-source and non-point-source pollution. *See, e.g.*, *Greater Yellowstone*, 641 F. Supp. 2d at 1139 (no point source where runoff could take hundreds of years to move through four miles of groundwater to surface water).

Enforcement of the CWA as written is not incompatible with the NPDES permitting program, as TVA contends. (6RE31,TVA,atPageID#41). These protections have been recognized and implemented by EPA consistently for four decades,[7] under administrations of both parties, reaching back to EPA's injection well permitting in the 1970s. *See U.S Steel*, 556 F.2d at 852. As EPA recently explained, "EPA and states have been issuing permits for this type of discharge [through a groundwater connection] from a number of industries, including chemical plants, concentrated animal feeding operations, mines, and oil and gas waste-treatment facilities." Br. United States Amici Curiae Supp. Pls.-Appellees at 30, *Haw. Wildlife Fund*, 881 F.3d 754.[8] For example, although well-constructed septic systems are usually excluded from the CWA because they do not discharge to surface waters, any such "systems which discharge to a surface water must, and can," meet requirements of the NPDES permitting program.[9]

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[7] EPA's litigation position in *Kelley*, cited by TVA, is not inconsistent. There, EPA addressed whether Congress included groundwater within the definition of navigable waters—not whether discharges to navigable waters through groundwater are prohibited by the CWA. 618 F. Supp. at 1105.

[8] The Court can take judicial notice of EPA's Amicus Brief under Federal Rule of Evidence 201. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 277–78 (2009) (agency's interpretation of regulation as presented in amicus brief is entitled to deference).

[9] EPA, Response to Congress on Use of Decentralized Wastewater Treatment Systems 5 (1997), https://nepis.epa.gov/Exe/ZyPDF.cgi/200047VF.PDF?Dockey=200047VF.PDF.

Similarly, EPA's standard permit for concentrated animal feeding operations ("CAFOs") prohibits discharges "to surface waters of the United States through groundwater with a direct hydrologic connection to surface waters."[10] EPA's CAFO rulemaking summarized its longstanding "jurisdictional determination" that the Act covers such discharges, recognized that the "determination of whether a discharge to ground water in a specific case constitutes an illegal discharge to waters of the U.S. if unpermitted is a fact specific one," and analogized it to other routine, fact-based determinations under the CWA, such as identifying jurisdictional wetlands. National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2,960, 3,018 (Jan. 12, 2001).

Finally, regulators will not bear an expanded regulatory burden, as TVA and its amici contend. Courts in dozens of states, including many of the amici themselves—*e.g.*, Georgia, West Virginia, Alabama, Montana, Kansas, Oklahoma Wyoming, and Utah—already recognize the CWA applies to point-source discharges through groundwater. *See supra* 23-25.

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[10] EPA Region 6, National Pollutant Discharge Elimination System (NPDES) General Permit for Concentrated Animal Feeding Operations (CAFOs) in New Mexico II.A.2(b)(vi) (Sept. 1, 2016), https://19january2017snapshot.epa.gov/sites/production/files/2016-07/documents/nmg010000_final_permit_nm_cafo-signed.pdf.

D. Neither RCRA nor the CCR Rule Insulates TVA from Its CWA Duty to Stop Polluting the Cumberland River.

TVA argues for the first time on appeal that the Resource Conservation and Recovery Act ("RCRA") conflicts with enforcement of the CWA to protect surface waters from discharges of pollution through hydrologically connected groundwater. TVA waived this argument below and cannot now raise it on appeal. Moreover, it is simply wrong.

1. TVA Waived Any RCRA Argument.

An appellant cannot present an argument for the first time on appeal. *Armstrong*, 432 F.3d at 700. The record contains only a few scattered references to RCRA, and none that are germane to TVA's argument that applying the CWA to its pollution of the river conflicts with RCRA and the CCR Rule. TVA stated below: "TVA does not seek an adjudication of whether TVA's CCR Rule compliance is a defense to CWA liability." (RE194,TVAResp.MIL,atPageID#7126). Accordingly, TVA waived this argument and the Court should not consider it.

2. RCRA Does Not Conflict with the CWA's Prohibition Against Polluting the Cumberland River.

RCRA and the CWA are not "mutually exclusive" (RE31,TVA,at PageID#48), as TVA claims. To the contrary, Congress carefully designed RCRA to "integrate" with and "accommodate" the CWA. 42 U.S.C. § 6905(b)(1). RCRA and its implementing regulations apply only to the extent they are "not inconsistent with the requirements" of other environmental laws. *Id.* § 6905(a).

Accommodation between the CWA and RCRA must "remain true to the goals of all of the relevant environmental statutes" and not allow the "lowest common denominator" to control. *Chem. Waste Mgmt., Inc. v. EPA*, 976 F.2d 2, 23 n.9 (D.C. Cir. 1992). To pre-empt RCRA and its regulations, "the CWA must require something fundamentally at odds with what RCRA would otherwise require." *Goldfarb v. Mayor of Balt.*, 791 F.3d 500, 510 (4th Cir. 2015). There must be a conflict between the CWA and RCRA that is "incompatible, incongruous, inharmonious." *Id.*

TVA argues that CWA enforcement against its discharges would exempt it from regulation under RCRA because the "solid waste" regulated by RCRA excludes "industrial discharges which are point sources." (6RE31,TVAatPage ID#48 (citing 42 U.S.C. § 6903(27))). Congress was not so careless. "This exclusion applies only to the actual point source discharge." 40 C.F.R. § 261.4(a)(2) cmt. It does not exclude "industrial wastewaters while they are being collected, stored or treated before discharge, nor does it exclude sludges that are generated by industrial wastewater treatment." *Id.* As a case cited by TVA explains, "it is only the actual discharges from a holding pond or similar feature into surface waters which are governed by the [CWA], not the contents of the pond or discharges into it." *United States v. Dean*, 969 F.2d 187, 194 (6th Cir. 1992)

(applying RCRA to wastewater impoundments subject to CWA enforcement for unpermitted discharges).

Like RCRA, the CCR Rule does not supersede CWA enforcement against coal ash impoundments. TVA must "comply with all other applicable federal ... laws" and its impoundments "shall not cause a discharge of pollutants into waters of the United States that is in violation of the requirements of the NPDES under section 402 of the Clean Water Act, as amended." 40 C.F.R. §§ 257.3-3, 257.52(a)–(b).

The CWA applies to TVA's unpermitted discharges of pollutants into the river via underground flows, while RCRA applies to TVA's unsafe storage of coal ash. TVA must comply with *both* the CWA and RCRA, exactly as Congress intended.

II. TVA's Violations of NPDES Permit Conditions at Its Ash Pond Complex Independently Justify the District Court's Order.

In addition to liability for unpermitted discharges, TVA must remedy violations of the NPDES permit for the Complex. 33 U.S.C. § 1342(h).

TDEC is empowered to prescribe conditions for NPDES permits it deems fit to "assure compliance with the requirements" of the CWA. *See id.* § 1342(a)(1). TVA's permit includes two such conditions. The district court's determination that pollution from TVA's Complex violates those terms is an independent basis for affirming its order directing TVA to excavate coal ash at the Complex. *Am. Canoe*

Ass'n v. Louisa Water & Sewer Comm'n, 389 F.3d 536, 539 (6th Cir. 2004) ("Noncompliance with a [NPDES] permit constitutes a violation of the Act.").

A. TVA Is Violating the Removed-Substances Provision of Its NPDES Permit.

TVA's Complex is regulated as a wastewater-treatment facility designed to treat coal ash wastewater by allowing pollutants to settle out (RE235,Tr. v.2,at PageID#9011:9-9012:2), before the wastewater is discharged through a single, authorized point, Outfall 001. (RE235,Tr.v.2,atPageID#9012:21-24;9013:13-17;9014:3-11). Accordingly, TDEC included in TVA's permit a commonsense "removed-substances provision," which requires: "Sludge or any other material removed by any treatment works must be disposed of in a manner, which prevents its entrance into or pollution of any surface or subsurface waters." (RE1-2,2012 Permit&Rationale,atPageID#68,§I.A.c.). The district court correctly concluded the leaking Complex violates this provision.

The removed-substances provision is a common NPDES permit condition required by EPA. *See* 40 C.F.R. § 440.148(c) (requiring assurances "that pollutant materials removed from the process water and wastewater streams will be retained in storage areas and not discharged or released"). It "is based on the simple proposition that there is no way one can protect the water quality of the waters of the U.S. if the [polluter] is allowed to redeposit the pollutants collected in his settling ponds back in the waters of the U.S." *In re 539 Alaska Placer Miners*, No.

1085-06-14-402C, 1990 WL 324284 (EPA), at *8 (E.P.A. Mar. 26, 1990). Courts have recognized "[t]he removed substances provision aims to ensure the integrity of wastewater treatment and control systems" because "[i]f you have a wastewater treatment plant, it can't leak." *Yadkin Riverkeeper*, 141 F. Supp. 3d at 446.

TVA complains this provision is inapplicable because it appears under the heading, "Additional monitoring requirements and conditions applicable to Outfalls 001, 002 and 004." (6RE31,TVA,atPageID#64). TVA contends that the provision is limited to "monitoring" and governs only pollution from outfalls authorized by the NPDES permit. *Id.*

This argument violates routine principles of contract construction. "NPDES permits are treated like any other contract." *NRDC, Inc. v. City of L.A.*, 725 F.3d 1194, 1204 (9th Cir. 2013). Under well-established rules of interpretation, "[T]he heading of a [contract's] section cannot limit the plain meaning of the text." *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519, 529 (1947). Instead, "[I]f 'the language is plain and capable of legal construction, the language alone must determine' the permit's meaning." *Piney Run Preserv. Ass'n v. Cty. Comm'rs of Carroll Cty,* 268 F.3d 255, 270 (4th Cir. 2001).

The plain text of the removed-substances provision requires more than monitoring. TVA must prevent coal ash "removed" from wastewater in the course of treatment from "enter[ing]" or "pollut[ing]" "any surface or subsurface waters."

(RE1-2,2012Permit&Rationale,atPageID#68). The text reaches beyond permitted outfalls, none of which discharges to the "subsurface waters" protected by the provision, and expressly requires TVA to maintain the integrity of its wastewater treatment facilities by preventing unauthorized leaks of pollutants from impoundments into groundwater and surface water.

Finally, TVA contends that the removed-substances provision prohibits only discharges of "material removed by any treatment works," and not "liquid discharges." (6RE31,TVA,atPageID#64). This argument fails as both a matter of fact and of law. Evidence established that TVA allowed coal ash solids to "ent[er] into" "subsurface waters." (RE258,FF&CL,atPageID#10532-33,¶¶469-70). As a matter of law, the removed-substances provision prohibits "pollution of any surface or subsurface waters" by coal ash contaminants, including contaminants dissolved in water. *Id.* The district court properly found that coal ash from the Complex has polluted groundwater and the river, and thereby violated the removed-substances provision. That finding alone is sufficient to sustain the district court's injunction.

B. TVA Is Violating the Sanitary-Sewer-Overflow Provision of Its Permit.

The sanitary-sewer-overflow provision of TVA's permit prohibits "discharge to land or water of wastes from any portion of the collection, transmission, or treatment system other than through permitted outfalls." (RE1-2,PageID#79).

TVA would confine this provision to sewage from a "sanitary sewer system," and exclude industrial discharges from its ash ponds. (6RE31,TVA,at PageID#64). This argument defies the text of the provision, which broadly applies to all "wastes" from the "treatment system" authorized by the permit. (RE1-2,2012Permit&Rationale,atPage-ID#79). In the context of TVA's permit, which does not include sanitary-sewer discharges, TVA's interpretation would render the provision meaningless. Courts "avoid interpreting contracts to contain superfluous words." *TMW Enters., Inc. v. Fed. Ins.*, 619 F.3d 574, 578 (6th Cir. 2010).

Without textual support, TVA argues the provision must be reinterpreted in light of an EPA guidance manual that governs, specifically, sanitary sewer systems. (6RE31,TVA,atPageID#64). The supervisor of TDEC's water-based systems unit, who reviewed and signed the permit, testified that, while this provision is patterned after the EPA guidance, TDEC expanded it to include "any wastewater at the facility that is authorized by this permit." (RE235,Tr.v.2,atPage ID#9023:17-9024:6). That expansion implements TDEC's regulations, which define "sanitary sewer" to include any "conduit intended to carry liquid and water-carried wastes from ... industrial plants." Tenn. Comp. R. & Regs. 0400-46-02-.02(43).

TDEC's interpretation of its own permit is entitled to deference. *Coeur Alaska*, 557 U.S. at 462 (agency's interpretation of regulation is entitled to deference); *S. Appalachian Mountain Stewards v. Red River Coal Co.*, No.

2:14CV00024, 2015 WL 1647965, at *4 (W.D. Va. Apr. 14, 2015) (deference to be given to an agency's interpretation of its own regulations when issuing a permit). The district court correctly credited the testimony of TDEC's witness, embraced the plain text of the provision, and found TVA in violation. (RE258,FF&CL,at PageID#10456,¶151).

The court concluded the Complex discharged wastes from its treatment system to groundwater and the Cumberland River other than through its permitted outfalls. (RE258,FF&CL,atPageID#10534¶¶477-78). Nothing more is required to find TVA violated its permit and to order injunctive relief.

C. TDEC's Routine Compliance Inspections of the Complex Do Not Excuse TVA's Permit Violations.

Finally, TVA argues the district court's finding of permit violations should be reversed because routine Compliance Evaluation Inspections of its impoundments failed to cite TVA for those same violations. (6RE31,TVA,atPageID#63). Those visual site inspections investigated "seeps" emerging laterally through the dikes, not whether leakage was occurring through the bottom of the impoundments or through groundwater. (RE237,Tr.v.4atPageID#9506:14-18;9506:25-9507:4). Notably, TVA passed such inspections while the Complex was incapable of holding wastewater. (RE237,Tr.v.4,atPageID#9417:2-22;RE258,FF&CL,atPageID #10526-27,¶445). Further, TDEC's inspections do not dictate the outcome of this CWA citizen suit brought for violations of permit terms that TDEC failed to

enforce or violations independent of the permit. Moreover, TDEC's compliance inspector did not take samples or attempt to confirm compliance with every permit term. *See, e.g.*, (App.v.1at114,JX247,RE 238atpageID#9588; App.v.1at116, JX249,RE238atPageID#9588 (non-sampling compliance inspection did not evaluate sludge disposal or sewer overflows)).

III. TVA Did Not Meet Its Burden of Proving a Permit-Shield Defense.

A. TVA Cannot Invoke the Permit Shield Because It Has Violated Its NPDES Permit.

By its plain language, the CWA's permit-shield provision applies only where the permittee *fully* complies with its permit's terms. 33 U.S.C. § 1342(k). *See also EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976) (permit shield requires "compliance with the terms and conditions of an NPDES permit"). Because TVA has violated the removed-substances and sewer-overflow provisions of its permit (*see supra* pp. 35-39), it cannot claim any permit-shield defense.

B. There Is No Permit Shield for Discharges from Locations Other than Permitted Outfalls.

TVA contends it is not liable for unpermitted discharges through seeps and groundwater from the Complex because its permit authorizes discharges from Outfall 001. The "permit-shield" doctrine does not authorize TVA to evade treatment requirements by discharging through unpermitted leaks.

The CWA provides that "[c]ompliance with [an NPDES] permit ... shall be deemed compliance" with the Act. 33 U.S.C. § 1342(k). The primary purpose of this "permit shield" is "to insulate permit holders from changes in various regulations during the period of a permit." *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n.28 (1977). The provision also covers pollutants in permitted discharges that were disclosed by an applicant but where the final permit lacks discharge limits. *See, e.g.*, *ICG Hazard*, 781 F.3d at 287 (shield applies to additional pollutants "*in a given discharge*" (emphasis added)).

The permit-shield doctrine does not authorize TVA to discharge pollutants from undisclosed and unpermitted leaks. In an NPDES permit application, it is the applicant's burden to "disclose[] the nature of its effluent discharges" and the regulator's burden to "place[] limits on those pollutants that … it 'reasonably anticipates' could damage the environmental integrity of the affected waterway." *Piney Run*, 268 F.3d at 268. EPA does not leave this to chance or vague "contemplation" of possible discharges. Every NPDES permit application must include "[a] topographic map ... depicting ... each ... discharge structure[]." 40 C.F.R. § 122.21(f)(7).

In *Legal Environmental Assistance Foundation, Inc. v. Hodel*, defendants, like TVA, argued that "a [sic] NPDES permit for one point source of pollution, allows many other point sources of pollution." 586 F. Supp. 1163, 1168–69 (E.D.

Tenn. 1984). The court rejected that argument as "inconsistent with the remedial purpose of the CWA and the requirement that any point source of pollutant discharge be authorized by permit." *Id.* at 1169.

Numerous other courts have held that an individual NPDES permit does not authorize additional undisclosed point-source discharges of pollutants. *See, e.g.*, *United States v. Tom-Kat Dev., Inc.*, 614 F. Supp. 613, 614 (D. Alaska 1985) ("Every identifiable point that emits pollution ... must be authorized by a [sic] NPDES permit."); *Coldani*, 2007 WL 2345016 (NPDES permit "is of no consequence" in case enforcing unpermitted discharges through groundwater); *Buchholz v. Dayton Int'l Airport*, No. C-3-94-435, 1995 WL 811897, at *23 (S.D. Ohio Oct. 30, 1995) (permit for outfall did not authorize unpermitted discharges); *Colo. Ref. Co.*, 838 F. Supp. at 1434 (groundwater discharges not authorized by permit).

C. TVA's NPDES Permit for the Ash Pond Complex Does Not Authorize Unpermitted Discharges at the Non-Registered Site.

The NRS stopped receiving ash in 1970, two years before Congress passed the CWA and authorized its NPDES permitting program. (RE226,Jt.Stip.,atPage ID#8325-26,¶7). TVA did not apply to TDEC for authorization to discharge pollution from the NRS (RE1-1,Schematic,atPageID#56), which is not even mentioned in the permit. When the district court inquired about the permit's scope, TVA's counsel conceded, "I agree that it's written for the Ash Pond Complex."

(RE236,Tr.v.3,atPageID#9253:24-9254:2). As the head of TDEC's water-based permitting unit testified, the long-closed NRS is "not part of the NPDES permit" for the active wastewater-treatment plant at the Complex. (RE235,Tr.v.2,atPage-ID#9029:18).

Nonetheless, TVA now argues that the district court allowed a collateral attack on the permit and denied TVA the benefit of a "permit shield" for discharges from a site that has never been encompassed by an NPDES permit. (6RE31,TVA, atPageID#53). TVA's only evidence is the non-binding addendum to TDEC's explanatory rationale, released with the permit. (6RE31,TVA,atPageID #54). *See also* (RE235,Tr.v.2,atPageID#9007:8-12 (testifying that permit rationale is non-binding)). Not only is the rationale non-binding, it is irrelevant: it merely declined to consider concerns raised by conservation organizations about possible discharges at the NRS that TVA failed to disclose.

TVA bears the burden of proving that discharges from its NRS are protected by a "permit shield" as an affirmative defense. *S. Appalachian Mountain Stewards v. A & G Coal Corp.*, 758 F.3d 560, 569 (4th Cir. 2014). The district court properly concluded that TVA fell far short of that burden and held it strictly liable for unpermitted discharges from the NRS. (RE258,FF&CL,atPageID#10531,¶466).

D. TVA Did Not Disclose Seeps or Discharges Through Karst Features at the Complex in its Permit Application.

TVA has consistently denied any discharges through seeps or karst features from the Complex. (*See, e.g.*, RE237,Tr.v.4,atPageID#9449:15-20 (TVA's witnesses testified to "absence of non-seepage flows, such as through sinkholes and fissures, from the Ash Pond Complex to the underlying groundwater"); RE236, Tr.v.3,atPageID#9395:22-24 ("no reported sinkholes within the complex")). TVA cannot credibly deny all evidence of such discharges and still claim it disclosed them to TDEC in its permit application.

Even if the permit shield could apply here as a matter of law, the "key" to the permit-shield defense is that "the polluter complied with the disclosure requirements under the relevant permit." *IGC Hazard*, 781 F.3d at 288. Evidence proved that TVA never disclosed discharges to the river through seeps or features of the karst terrain underlying the Complex. (RE258,FF&CL,atPageID#10500, ¶¶356-57;10532,¶467).

The schematic of the Complex TVA filed with its permit application shows no such discharges. (RE1-1,Schematic,atPageID#56). A TDEC witness testified for TDEC that, if TVA *had* disclosed such discharges, the information would be in the permit application itself. (RE235,Tr.v.2,atPageID#9020:5-9). Accordingly, Vojin Janjić, head of TDEC's Water-based Systems Unit., testified that discharges

from the bottom of the Complex through karst features are not authorized or contemplated by the permit. (RE235,Tr.v.2,atPageID#9020:10-9021:4).

To meet its burden of proof for the permit-shield defense, TVA offered only (1) comments from third parties, (2) an addendum to a non-binding permit rationale responding to those comments, (3) an email from a TDEC employee, and (4) an internal TDEC email discussing a report prepared by TVA's consultant. Significantly, none of this scant evidence documented any attempt *by TVA* to disclose seeps or karst-related discharges at the Complex in its permit application, and none of these documents supports TVA's contention that TDEC contemplated the unauthorized discharges.

First, the third parties' comments had nothing to do with seeps or karst-related discharges *at the Complex*, but noted a potential for discharges from surface seeps *at the NRS*. (RE1-2,2012Permit&Rationale,atPageID#105;App.v.1at16-17,JX 150,RE238atPageID#9584;RE235,Tr.v.2,atPageID#9028:25-9029:18). Those comments about non-karst discharges at a separate site not encompassed within the permit did not put TDEC on notice of discharges at the Complex.

Second, neither TDEC's rationale for TVA's permit nor its addendum—in which TDEC acknowledged receiving comments from conservation organizations *about the NRS*—is part of the permit for the *Complex*, and neither document modifies permit terms. (RE235,Tr.v.2,atPageID#9027:21-9028:14,9006:22-

9007:12). More importantly, TDEC's response to comments proves it never contemplated the discharges at issue in this litigation. TDEC noted the possibility of small seeps with immeasurable flow rate, diffused over a wide area, which caused, at most, de minimis pollution. (RE235,Tr.v.2,atPageID#9030:16-9031:1; RE1-2,2012Permit&Rationale,atPageID#105). A TDEC witness testified the permit authorized no discharges with measurable, discernible flow. (RE235,Tr.v.2,atPageID#9020:3-4). Far from authorizing seeps, the permit required any seeps with discernible flow (meaning "more than a wet spot") at the Complex to be remediated. (RE235, Tr.v.2,atPageID#9018:7-9019:1; RE235,Tr.v.2,atPageID#9015:12-9016:23).

Third, TVA relies on an email between two TDEC employees, Janjić and Bob Alexander, discussing the conservation organizations' comments and TDEC's response. But internal TDEC staff emails do not alter the terms of a properly adopted, final NPDES permit. *De La Mota v. U.S. Dep't of Educ.*, 412 F.3d 71, 82 (2d Cir. 2005) (refusing to defer to email from agency staff who lack policy-making authority). Moreover, the email, when read in full, confirms TDEC had no concrete knowledge about specific discharges: "My recommendation is to say we're always interested in knowing about any discharges - maybe this person knows something we don't." (App.v.118,JX137,RE238atPageID#9583).

Fourth, TVA points to one of its own reports, circulated among TDEC staff, which acknowledged discharges through karst at the Complex in the 1970s. That TDEC staff independently discovered a statement documenting karst-related discharges *40 years* ago does not relieve TVA of its obligation to disclose any karst-related discharges that continue *today*.[11]

TVA offered no credible evidence that its permit application disclosed or TDEC actually contemplated seep- and karst-related discharges from the Complex. At most, TVA has flagged some conservation organizations' worries that the impoundments had the *potential* for discharges not disclosed by TVA. But TVA must itself disclose any discharges it wants included in a permit or covered by a permit shield. Moreover, when members of the public alert a state agency to illegal activity and it fails to act, the CWA confers not a permit shield insulating the polluter from liability, but rather the right of citizens to enforce the law against the polluter. 33 U.S.C. § 1365. TVA failed to prove it was entitled to a permit-shield defense for those discharges. (RE258,FF&CL,atPageID#10531,¶466).

[11] Until this appeal, TVA never presented this report as a permit shield. Neither Conservation Groups nor the court had the opportunity to consider this argument and it should be deemed waived. *Armstrong*, 432 F.3d at 700.

IV. The District Court Ordered the Only Remedy Proven to Correct Violations of the CWA.

The court exercised its equitable discretion to craft the relief "necessary to secure prompt compliance with the Act." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982). Courts retain equitable discretion as to the *nature* of the relief, but the relief ordered must achieve compliance with the Act. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 69 (1987) (Scalia, J., concurring) (polluter "remains ... 'in violation' ... so long as it has not put in place remedial measures that clearly eliminate the cause of the violation").

The district court found that TVA can comply with the CWA and its NPDES permit only by removing the ash to dry, lined storage. TDEC scientists have independently determined excavation to be the preferred remedy. (RE251-11,StateRedline,atPageID#10332-10333).

The court's exhaustive, 123-page summary of the case and its evidence leaves no room for a "definite and firm conviction that the trial court committed a clear error of judgment" requiring reversal of its equitable discretion. *Herman Miller*, 270 F.3d at 317. Instead, the evidence warrants injunctive relief based on (1) irreparable injury, (2) inadequate remedies at law, (3) the balance of hardships, and (4) the public interest. *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

The district court, which was in the best position to judge the credibility of witnesses,[12] credited evidence that showed and witnesses who testified:

- There is "extensive karst activity immediately below the Ash Pond Complex" and "isolated repairs could not be expected to simply render those karst conditions a thing of the past." (RE258,FF&CL,atPageID# 10525,¶441).
- The impoundments are fundamentally "unsuitable for the containment of coal ash." (RE258,FF&CL,atPageID#10432,¶44).
- "The parties agree—and indeed it appears beyond dispute—that the Ash Pond Complex was built upon terrain riddled with potential karst-related leaks, and that those leaks did in fact result in substantial discharge of pollution from the Cumberland River." (RE258,FF&CL,atPageID #10526,¶443).
- "The features at the Ash Pond Complex strongly suggest that it has continued to, and will continue to, leak through karst features that cannot be characterized as 'seeps alone.'" (RE258,FF&CL,atPageID#10528, ¶452).

[12] *Harrison v. Monumental Life Ins. Co.*, 333 F.3d 717, 721 (6th Cir. 2003) ("When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings….").

- The river and the vast majority of samples taken from the west shoreline contained toxic coal ash contaminants elevated above naturally-occurring levels. (RE258,FF&CL,atPageID#10448-50,¶¶114-119;10459-61,¶¶167-73;10462-63,¶¶183-86;10457-58,¶¶159-63(conductivity testing);10467, ¶¶204-07).
- Selenium has been documented in the river at 50 times the aquatic life standard and in sediment at 65 times the applicable standard. (RE258,FF&CL,atPageID#10473-74,¶¶232-35;RE235,Tr.v.2,atPageID# 9156:16-18,9157:21-25).
- Selenium contamination is likely bioaccumulating in fish and causing toxicity in aquatic life. (RE258,FF&CL,atPageID#10469-10474,¶¶217-21,228-35).
- Elevated contaminant levels in the river are caused by continuing discharges. (RE258,FF&CL,atPageID#10461-63,¶¶ 174,187; c*f. id.* atPageID#10468,¶210 (Vengosh testimony "that water contaminated by coal ash from the [Complex] and [NRS] is discharging into the groundwater and surface water"); *id* at ¶212 (finding Vengosh "highly credible")).
- Significant amounts of coal ash have accumulated in the river. (RE258,FF&CL,atPageID#10442,¶90;10463,¶186;10486,¶294).

- Coal ash in the impoundments is submerged below the ground-water table. (RE258,FF&CL,atPageID#10432,¶46;10508,¶377; 10538,¶494).
- The NRS is still leaking 20 years after it was "closed." (RE258,FF&CL, atPageID#10539,¶496).
- TVA's consultants previously concluded that closure-in-place "would not yield a significant reduction in risk in the groundwater transition zone." (App.v.1at85,JX59,RE238atPageID#9579;RE234,Tr.v.1atPageID#8914:4 -6).
- TVA's consultants previously advocated for installing a liner beneath all ponds or converting to dry disposal. (RE234,Tr.v.1,atPageID#8780:24-8781:13;RE164-17,Stantec2009,atPageID#6708,6714,6721).
- TVA has an on-site landfill that can be expanded to hold the excavated ash. (RE236,Tr.v.3,atPageID#9330:2-6) (TVA witness: "100-plus acre landfill facility" needed)); (App.v.1at5-6,§2.1.1,JX92,RE238at-Page ID#9581 (TVA memo finding unused on-site land available for additional 97 acres of landfill capacity)).

On this record, the court concluded that capping-in-place would not "actually put an end to the inadvertent discharges that have plagued the Gallatin plant for the entirety of its existence." (RE258,FF&CL,atPageID#10538,¶493).

Instead, the court ordered the *only* remedy proven to stop TVA's illegal contamination of the river: excavation of coal ash to a lined landfill.

A. Contamination of the Cumberland River Is Irreparable Harm Warranting Injunctive Relief.

Despite this overwhelming evidence, TVA contends that the court contravened Supreme Court authority that trial courts must not "erroneously presume[] irreparable harm from the mere fact of statutory violation," (6RE31,TVA,atPageID#66 (citing *NRDC, Inc. v. Texaco Refining & Mktg., Inc.*, 906 F.2d 934, 941 (3d Cir. 1990); *Weinberger*, 456 U.S. at 320)), and that the district court lacked authority to issue *any* injunctive relief.

Weinberger held that injunctive remedies must cure violations of the CWA, and clarified that this mandate does not require "a district court to enjoin *immediately* all discharges of pollutants." 456 U.S. at 306 (emphasis added). There, the district court enjoined the Navy to seek a permit for unpermitted discharges, even though they "ha[d] not harmed the quality of the water." *Id.* at 307. The Court of Appeals disagreed, requiring *immediate* cessation of the discharges. The Supreme Court restored the district court's injunction, allowed the defendant reasonable time to correct its violations, and reaffirmed the court's equitable discretion "to order that relief it considers necessary to secure prompt compliance with the Act." *Id.* at 320. The Court would have reached a different result if the "objective of the statute could … not be vindicated" and directed the

district court to reconsider its order "[s]hould it become clear … that compliance with the [CWA] will not be forthcoming." *Id.*

Here, the court acknowledged it was "not automatically required to issue injunctive relief" based on a mere violation. (RE258,FF&CL,atPageID#10534, ¶479 (citing *Weinberger*, 456 U.S. at 311)). But, as described above, *supra* pp. 49-51, the court heard and credited evidence of tangible harm to the environment caused by TVA's violations.

TVA's contention that *no* injunctive relief is available because the district court did not "quantify" irreparable harm to the river is inconsistent with *Weinberger*. (6RE31,TVA,atPageID#69). The district court ensured compliance with the CWA, as required by *Weinberger*, when it ordered excavation because the "evidence offer[ed] ample reason to doubt that closure in place can actually put an end to the inadvertent discharges that have plagued the Gallatin plant for the entirety of its existence." (RE258,FF&CL,atPageID#10538,¶493).

In the other cases TVA cites, environmental injury was either wholly in the past or purely speculative, and the courts warned that *ongoing* environmental injury warranted injunctive relief. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) (affirming trial court's equitable discretion to deny injunctive relief for purely procedural violations where injury "was not at all probable," and cautioning that "[e]nvironmental injury, by its nature, ... is often permanent or at

least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment"); *Town of Huntington v. Marsh*, 884 F.2d 648, 653 (2d Cir. 1989) (purely procedural violations of National Environmental Policy Act alone do not *mandate* injunctive relief, but "[b]roader injunctive relief is appropriate, of course, where substantial danger to the environment, in addition to a violation of procedural requirements, is established"); *Texaco,* 906 F.2d at 941 (remanded for district court to reconsider injunction and advised the court that "[e]nvironmental injury, by its nature, ... is often ... irreparable").

The environmental injury here is neither procedural nor speculative. The court concluded that "unauthorized *contamination* itself is a harm warranting remediation." (RE258,FF&CL,atPageID#10537,¶489 (emphasis added)). Evidence confirmed contamination in the river, sediment, and soils, and a high likelihood that contaminants are bioaccumulating in fish. (RE258,FF&CL,at PageID#10469-10474,¶¶217-21,228-35;RE258,FF&CL,atPage-ID#10448-50,¶¶114-119;10459-61,¶¶167-73;10462-63,¶¶183-86;10457-58,¶¶159-63(conductivity testing);10467,¶¶204-07.). Unlike the injury in *Amaco*, the district court found that future contamination at Gallatin was "likely to reoccur." (RE258, FF&CL,atPageID#10520-22¶¶419,430). Looking to the NRS as an example of what to expect, the district court found "no evidence" that closure-in-place would

stop CWA violations. (RE258,FF&CL,atPageID#10521,¶¶423-24;10539,¶496 ("The history of the NRS offers a grim preview of what it means to leave an abandoned unlined coal ash waste pond in place next to a river.")).

According to TVA, injunctive relief is unnecessary until its illegal pollution, in combination with other polluters, causes the river to fall so far below minimum water quality standards that an entire section is designated "impaired." (6RE31,TVA,atPageID#67). Similarly, TVA suggests that environmental injury only occurs if the river is rendered unusable by downstream water utilities. *Id.*

The CWA requires better for the Cumberland River, directing that water "quality shall be maintained and protected" even "[w]here the quality of the waters exceeds levels necessary" to meet water quality standards. 40 C.F.R. § 131.12(a)(2). Action is required to *prevent* waters from becoming impaired or unusable for their intended purpose.

When a district court weighs injunctive remedy for a statutory violation, it "cannot, for example, override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited. 'Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is ... for the courts to enforce them when enforcement is sought.'" *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 496–97 (2001). This Circuit has confirmed that trial courts must evaluate "irreparable harm" while "consider[ing] the express purposes

of the [relevant statute] as well as the parties and interests involved in [the] litigation." *United States v. Miami Univ.*, 294 F.3d 797, 817–18 (6th Cir. 2002).

Evidence of karst topography, saturated groundwater, and contamination in the river, sediment, and fish—assessed in light of Congress' statutory objective to protect and restore U.S. waters—amply supports finding that "plaintiffs have easily cleared the initial hurdle of demonstrating that injunctive relief is necessary." (RE258,FF&CL,atPageID#10537,¶489).

The district court's acknowledgement, as it contemplated punitive penalties against TVA, that the worst harm that *can* be caused by long-term, uncontrolled pollution has not yet been manifested in sampling results from the river, is consistent with its injunctive order. In light of the magnitude of the injunctive relief required to stop TVA's violations, the court declined to impose financial penalties. (RE258,FF&CL,atPageID#10535-36,¶¶484). But there is no question but that TVA is contaminating the river with illegal discharges, an environmental injury that violates the objectives of the CWA and demands injunctive relief.

B. The District Court Balanced the Equities and Chose the Only Remedy Proven to Secure Compliance with the CWA.

After concluding that injunctive relief was required to stop TVA's contamination, the district court carefully balanced proposed remedies.

TVA argues the court should have weighed the purpose and intent of the CWA against "the public's interest in reasonable electricity rates." (6RE31atPage

ID#70). There was no evidence presented to the district court of the cost, if any, to ratepayers.[13] Even if there had been, this consideration was not within the court's equitable discretion.

In *Oakland Cannabis*, the Supreme Court clarified that "the mere fact that the District Court had discretion does not suggest that the District Court ... could consider any and all factors that might relate to the public interest or the conveniences of the parties." 532 U.S. at 497. With the CWA, "Congress made a clear policy choice in favor of environmental protection. (There is no exception to permit compliance because such compliance is expensive.)." *Ohio Valley Envtl. Coal., Inc. v. Apogee Coal Co., LLC*, 555 F. Supp. 2d 640, 649 (S.D. W. Va. 2008). "[A] court sitting in equity cannot ignore the judgment of Congress, deliberately expressed in legislation." *Id.*

Similarly, in *Cundiff,* this Court implemented the CWA's "goal of restoring and maintain[ing] the ... integrity of the Nation's waters" as it affirmed a remedy that would "confer maximum environmental benefits," even though it would "not allow [Defendants] to see sufficient future profits." 555 F.3d at 216. Numerous

[13] The only evidence TVA presented that ratepayers would shoulder the cost were two sentences of testimony by TVA's vice-president that the cost would be "paid by TVA ratepayers." (RE237,Tr.v.4,atPageID#9521:13-16). The court considered his testimony and found he "credibly express[ed] the position of TVA. By virtue of his position, however, the Court afforded greater weight to other experts' discussions of the relative merits and demerits of the closure possibilities." (RE258,FF&CL,PageID#10497,¶347).

other courts have applied this analysis. *See also In re Sac & Fox Tribe of the Miss. in Iowa*, 340 F.3d 749, 760 (8th Cir. 2003) (court gives "great weight to the fact that Congress already declared the public's interest and created a regulatory and enforcement framework that balanced the need for regulation against the harm" of not ordering remedial action); *Pub. Interest Research Grp. of N.J., Inc. v. Rice*, 774 F. Supp. 317, 329 (D.N.J. 1991) ("Congress anticipated that the Act would impose a significant burden on industry, but determined that the objectives of the Act necessitated imposing this burden."); *Ohio Valley Envtl. Coal, Inc. v. Fola Coal Co.*, LLC, No. CV 2:13-5006, 2015 WL 5972430, at * 2 (S.D. W. Va. Oct. 14, 2015) ("Protecting water quality is 'a critical public interest that profoundly outweighs a company's bottom line.'").

Nonetheless, the court considered TVA's arguments that closure-in-place is "faster and less expensive than closure by removal," as well as TVA's assertions about "risks associated" with excavating coal ash. (RE258,FF&CL,atPageID #10538,¶492). Although the court would have chosen the cheaper option if it "would be adequate," it found that "[t]he evidence ... offers no such assurances—and in fact offers ample reason to doubt that closure in place can actually put an end to the inadvertent discharges that have plagued the Gallatin Plant for the entirety of its existence." (RE258,FF&CL,atPageID#10536-37,¶¶491-93). As the

Supreme Court directed in *Weinberger*, the district court chose the only remedy proven to "secure prompt compliance with the Act." 456 U.S. at 320.

Further, the court conducted a "search for possible remedies," including the possibility of ordering TVA to seek permit authorizations, like the district court in *Weinberger*. (RE258,FF&CL,atPageID#10539,¶497). The court found that was not an option because "the NPDES system ... simply does not envision the kind of blanket indulgences that TVA would need" for its leaking impoundments, and "TVA's insistence that its ponds be allowed to continue leaking cannot be reconciled with the Gallatin Plant's obligations under the CWA or NPDES." (RE258,FF&CL,atPageID#10540-41.¶498-99). Neither could the court incentivize TVA's compliance by imposing penalties. Illegal pollution at Gallatin results not from TVA's daily decisions, but from past decades of dumping coal ash into "an unlined ash waste pond in karst terrain immediately adjacent to a river." (RE258, FF&CL,atPageID#10541-42,¶503). These facts "impelled [the court] to select the one [remedy] that actually reliably promises to put an end to this saga" by stopping TVA's ongoing unlawful pollution. (RE258,FF&CL,atPageID #10541,¶500).

In keeping with *Weinberger*, the Court did not order "immediate cessation" of TVA's unlawful pollution, and instead allowed TVA to develop a proposal for how to comply.

TVA's cost estimate for "excavation and removal *offsite*" is hyperbolic, irrelevant to TVA's actual plans, and not reduced to net present value to reflect costs spread out over many years. (6RE31,TVA,atPageID#71 (emphasis added)). The only evidence TVA presented in support was one page summary offered by a corporate representative the court credited less than other trial witnesses, (App.v.1 at140,JX270,RE238atPageID#9589), who could not explain the basis for the number. (RE237,Tr.v.4,atPageID#9524:10-9526:19;RE258,FF&CL,atPageID #10497, ¶347).

TVA concedes the cost of removing coal ash to a new landfill *on-site* would be a fraction of its inflated estimate, but it chose not to put that evidence before the court. (6RE,TVA,atPageID#71(n.33)). Moreover, the court ordered only that TVA "excavate the coal ash waste … and remove it to an appropriate lined site that does not pose a substantial risk of discharges into the waters of the United States." (RE258,FF&CL,atPageID#10542). TVA is free to remove coal ash to an on-site landfill, the remedy preferred by TDEC. *See supra* p. 48. TVA has also proposed a leisurely schedule that would spread cleanup costs over many years.

Finally, there is no conflict between the court's order and the CCR Rule, which allows, and in some cases requires, TVA to close its impoundments by excavating and moving coal ash to a lined landfill, as the district court ordered. *See* 40 C.F.R. § 257.102(a)–(d). TVA's assertion that it cannot comply with the

order within the CCR Rule's 15-year closure deadline[14] was not presented to the court at trial. Moreover, TVA's inflated time estimates, like its overblown cost estimates, are based on the specter of hauling ash off-site, which the court has not ordered.

Furthermore, RCRA and the CCR Rule apply only to the extent they are "not inconsistent" with the CWA. 42 U.S.C. § 6905(a). The Department of Justice has explained that a RCRA requirement (which includes the CCR Rule) is "inconsistent"—and thus does not apply—if it "would prevent" an entity like TVA "from carrying out" the activities authorized or required by another statute, including the CWA. *Application of the Res. Conservation & Recovery Act to the Dep't of Energy's Atomic Energy Act Facilities*, 8 U.S. Op. Off. Legal Counsel 6, 7 (1984). Under such circumstances, RCRA requirements "must yield." *Id.* at 17. Even if TVA could demonstrate a conflict between a CCR Rule deadline and the court's CWA enforcement order, the deadline must yield to the CWA's substantive requirements set forth in the order.

Finally, TVA's concern that the district court injunction failed to defer to TDEC's State Action is unfounded. The district court dismissed all claims in this litigation that overlapped with TDEC's case. (RE258,FF&CL,atPageID#10513,

[14] Impoundments have at least five and up to 15 years to complete closure after closure work begins. 40 C.F.R. § 257.102(f)(1)(ii), (f)(2)(ii)(B).

¶393). Moreover, there is no conflict between the court's order and TDEC's enforcement action because TDEC's scientists and regulators, applying state law, arrived at the same remedy—excavation of coal ash. (RE251-11,StateRedline,at PageID#10332-33).

C. The Removed-Substances and Sewer-Overflow Provisions of TVA's Permit Require Removal of Coal Ash.

The removed-substances provision of TVA's NPDES permit prohibits "material removed by any treatment works," including the coal ash and ash pollutants in the Gallatin pits, to "ent[er] into ... any surface or subsurface waters." (RE258,FF&CL,atPageID#10532,¶469). The sanitary-sewer-overflow provision "forbids the discharge to land or water of wastes from any portion of the collection, transmission, or treatment system." (RE258,FF&CL,atPageID#10534, ¶477). The court found TVA violated both terms. (RE258,FF&CL,atPageID #10532,¶471;10534,¶478). Most importantly, the court found that "it does appear more likely than not that some portions of the ponds penetrate the water table." (RE258,FF&CL,atPageID#10538,¶494). Based on the evidence, an order compelling closure-in-place would have authorized perpetual violations TVA's permit.

Notwithstanding this evidence, TVA argues that the district court should have embraced its preferred remedy, closure-in-place. (6RE31,TVA,atPageID#71-

72). However, under federal law, the district court had no authority to enter such an order.

The court must order a remedy that achieves compliance with the terms of TVA's permit. Federal courts have no authority to disregard or amend provisions of NPDES permits, which can be issued only by EPA or the states. 33 U.S.C. § 1342(a)–(b). The permitting process is governed by strict procedural requirements to ensure the environment and the public are protected. Polluters cannot obtain NPDES permits or amendments without following the formal application process, which requires certain disclosures and opportunity for public comment. 33 U.S.C. § 1342(b)(3), (p)(4).

These procedures provide the *only* path to modify a polluter's obligations under an NPDES permit. As courts in this Circuit have explained, "In light of the supremacy of federal law in this area, a state cannot suspend the operation of the terms and conditions of a NPDES permit without following appropriate procedures." *United States v. City of Toledo*, 867 F. Supp. 603, 606 (N.D. Ohio 1994); *Frilling v. Vill. of Anna*, 924 F. Supp. 821, 829, 837, 844 (S.D. Ohio 1996) (consent order whereby state "excused" permittee from permit term on interim basis did not properly modify permit, which remained in "full force and effect," and polluter was in violation despite complying with "interim" standards).

Congress only granted federal courts "jurisdiction to enforce" NPDES permits, not to modify them. 33 U.S.C. § 1365(a)(2).

Having accepted the benefits and obligations of its permit, TVA is barred by the doctrine of exhaustion of administrative remedies from collaterally attacking it. *See Ky. Util. Co. v. FERC*, 766 F.2d 239 (6th Cir. 1985) (judicial review not available for any issue not first submitted to agency). TVA had no right to request, and the district court had no authority to grant, an order rewriting the permit by relieving TVA of its obligation to comply with its terms.

Under these facts, had the court ordered closure-in-place, with coal ash persistently steeping in groundwater, it would effectively have ordered TVA to violate the terms of its permit indefinitely. The district court lacks authority to enter that order.

CONCLUSION

Plaintiffs-Appellees ask this Court to affirm the district court's order that TVA is violating the Clean Water Act and its NPDES permit at the Gallatin Plant, and that TVA must excavate its leaking coal ash impoundments to comply with the CWA and its permit.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and 6 Cir. R. 32(a), the undersigned certifies that this brief complies with the type-volume limitations of the Fed. R. App. P. 32(a)(7)(B).

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN Fed. R. App. P. 32(f) and 6 Cir. R. 32(b)(1), THE BRIEF CONTAINS:

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/s/ Anne E. Passino

ADDENDUM

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13-5	*State of Tenn. et al. v. TVA*, 15-23-IV, Complaint (Davidson Co. Ch. Ct.)	320-337
13-7	*State of Tenn. et al. v. TVA*, 15-23-IV, Order Granting Intervention (Davidson Co. Ch. Ct.)	348-350
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52-1	*In re:* Tenn. Dep't. Env't & Cons., Div. Water Pollution Control, WPC12-0114, Petitioners' Notice of Voluntary Dismissal of Certain claims	1632-1635

54	Response to TVA's Motion for Summary Judgement as to all Claims Regarding Seeps	1643-1652
59-2	Master Regulation Manual for Reservoirs in the Cumberland River Basin	1881-1916
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139	Memorandum Opinion, *Tenn. Clean Water Network v. TVA*, 206 F. Supp. 3d 1280 (M.D. Tenn. 2016)	5327-5368
140	Order re: Memorandum Opinion, *Tenn. Clean Water Network v. TVA*, 206 F. Supp. 3d 1280 (M.D. Tenn. 2016)	5369-5370
163-2	Ungate, *Mar. 28, 1978 Survey of Gallatin Steam Plant Ash Disposal Pond* (Apr. 21, 1978)	6606-6610
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[15] The District Court stamp on Groves' direct written testimony was applied over a pre-existing stamp and is illegible.

259	Final Order	10543-10544
281	Notice of Appeal	11016-11019

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Plaintiffs-Appellees was filed electronically on March 15, 2018, through the Court's Electronic Filing System, which will send notice of the filing by operation of the Court's Electronic Filing System to all parties indicated on the electronic filing receipt, at the addresses listed below. Parties may access this filing through the Court's electronic filing system.

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No. 17-6155

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TENNESSEE CLEAN WATER NETWORK;
TENNESSEE SCENIC RIVERS ASSOCIATION

Plaintiffs-Appellees,

v.

TENNESSEE VALLEY AUTHORITY,

Defendant-Appellant.

On Appeal from the United States District Court for the
Middle District of Tennessee, Nashville Division

REPLY BRIEF OF DEFENDANT-APPELLANT TENNESSEE VALLEY AUTHORITY

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INTRODUCTION

The text, structure, and history of the Clean Water Act ("CWA") demonstrate that only discharges from discernable, confined, and discrete conveyances—point sources—to navigable waters are subject to regulation under the CWA's National Pollution Discharge Elimination System ("NPDES") program. Stretching the CWA's definition of point source discharge to encompass the diffuse migration of coal combustion residual ("CCR") leachate through groundwater is reversible error.

Plaintiffs-Appellees Tennessee Clean Water Network and Tennessee Scenic Rivers Association ("Plaintiffs") and their *amici* concede that groundwater is neither a point source nor a navigable water. And Plaintiffs fail to respond to TVA's argument that the CWA's structure and history show that Congress recognized the "essential link" between groundwater and surface waters but chose to regulate groundwater migration as nonpoint source pollution.

The district court's erroneous finding of CWA liability based on "directness" of the ubiquitous hydrologic connection between groundwater and navigable waters is atextual and cannot be squared with congressional regulation of groundwater pollution under the Resource Conservation and Recovery Act ("RCRA"). Plaintiffs cannot salvage this atextual standard by mischaracterizing

divided case law from other circuits, misreading Supreme Court dicta, or urging deference to inconsistent EPA guidance that is being reconsidered.

The district court's liability ruling should be reversed for the independent reason that CWA citizen suits cannot be used to second-guess regulatory decisions made by the Tennessee Department of Environment and Conservation ("TDEC") regarding the CCR sites at Gallatin. As for the Non-Registered Site ("NRS"), the district court erred by allowing a collateral attack on TDEC's decision to regulate the NRS as a solid waste site. And the CWA's permit shield applies to the Ash Pond Complex because Plaintiffs fail to refute (and the district court ignored) the administrative record of the 2012 Permit renewal and post-issuance evidence showing that TDEC reasonably contemplated karst-related leakage from the Complex yet determined that "no NPDES permit conditions are established." Instead, TDEC chose to rely on biological monitoring to address any risks from contemplated potential groundwater migration. Tennessee's failure to disclaim its knowledge and reasonable contemplation of karst-related leakage speaks volumes, as does Tennessee's acknowledgement that it addresses groundwater pollution through solid waste regulation—not CWA/NPDES permitting.

In its flawed remedial calculus, the district court imposed an extreme injunction, ordering TVA to excavate 13.8 million cubic yards of CCR at an estimated cost to TVA's ratepayers of $2 billion—based only on "scant" evidence

of harm and despite proof that, as compared to closure-in-place, excavation and removal will increase the risk of harm to the environment and the public. It also ignored the CCR Rule, which supplies a comprehensive, science-based remediation framework specifically designed to address CCR leachate pollution. Contrary to Plaintiffs' claim, Congress's enactment of the CWA did not strip the courts of their equitable discretion to consider these factors.

There is no lawful basis to contort the CWA to fit this case. A CWA citizen suit cannot be used to impose Plaintiffs' preferred closure-by-removal remedy under the guise of regulating point source discharges to navigable waters. RCRA and the CCR Rule provide both the legal authority and the regulatory framework specifically designed to address CCR leachate in a comprehensive fashion that protects both groundwater and surface water.

ARGUMENT

I. BASIC PRINCIPLES OF STATUTORY CONSTRUCTION FORECLOSE THE DISTRICT COURT'S HYDROLOGIC CONNECTION THEORY OF CWA LIABILITY.

A. As a Textual Matter, the Migration of Pollutants Through Groundwater to Navigable Waters Is Not a Point Source Discharge.

Plaintiffs, like the district court (FF&CL, RE258, PageID#10497), start their statutory analysis at the wrong place—by elevating one of the CWA's multiple purposes over Congress's other declared objectives[1] and, ultimately, the statute's text (Pls.' Br. 16; Waterkeeper Br. 6).[2] But the "'plain purpose' of legislation" must begin with "the plain language of the statute itself." *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373 (1986).

The CWA's key phrase, "discharge of pollutants," unambiguously excludes groundwater because it requires a "point source," defined as a "discernable, confined, and discrete *conveyance*." 33 U.S.C. § 1362(14); § 1362(12) ("Any addition of any pollutant *to* navigable water *from* any point source").[3]

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1 33 U.S.C. § 1251(a)–(b).

2 Much of the "overwhelming" authority cited by Plaintiffs (Pls.' Br. 25 n.5) is likewise unpersuasive, because the cases "rel[y] heavily on the purpose of the CWA." *Ky. Waterways Alliance v. Ky. Utils. Co.*, No. 5:17-292-DCR, 2017 WL 6628917, at *12 (E.D. Ky. Dec. 28, 2017).

3 Emphasis added here and throughout this brief unless otherwise noted.

Plaintiffs concede that groundwater is neither a point source nor a navigable water. (Pls.' Br. 21.) Therefore, Plaintiffs' (and the district court's) interpretation stretches the phrases "from any point source" and "to navigable waters" to encompass pollutants that seep diffusely through no particular path to groundwater and which the groundwater ultimately conveys to navigable waters. The text, however, cannot sustain this reading.

"Conveyance" is the operative (and only) noun in the statutory definition of "point source." 33 U.S.C. § 1362(14). As the Supreme Court explained, it is the point source that must "convey the pollutant to 'navigable waters.'"[4] *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004). Plaintiffs claim that a point source need not be the "means by which pollutants reach and are added to navigable waters" if the original source of pollutants is a point source. (Pls.' Br. 18-19.) Not so. *Miccosukee* holds that the definition of ""discharge of a pollutant' ... includes within its reach *point sources* that do not themselves generate pollutants." 541 U.S. at 105. But it does not erase the statutory text, which requires a point source to be the mechanism that "convey[s]

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[4] Conveyance" means "*the action of conveying* ... carrying, *transporting.* (Webster's Third New International Dictionary 1964, RE242-3, PageID#9860.)

the pollutant to 'navigable waters'" and must also be "'discernable, confined, and discrete.'" *Id.* (quoting §§ 1362(7), (14)).[5]

Nor does use of "well" as an example of a "conveyance" show that Congress "understood that surface water discharges through groundwater may be regulated by the CWA." (Pls.' Br. 28.) The statutory examples cannot expand the definition beyond items that are "discernible, defined and discrete conveyance[s]." 33 U.S.C. § 1362(14). That some injection wells may convey pollutants to navigable waters does not turn groundwater into a discrete conveyance. (TVA Br. 26.)[6]

Further, "[t]he statute says what it says—or perhaps better put here, does not say what it does not say." *Cyan, Inc. v. Beaver Cnty. Employees Retirement Fund*, 138 S.Ct. 1061, 1069 (2018). The phrase "through groundwater" appears nowhere in the statute. The text cannot plausibly be read to transform groundwater into a "discernable, defined and discrete conveyance" simply because groundwater is connected to navigable water—neither hydrogeology nor purpose can supplant text.

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5 Plaintiffs did not contend (and the district court did not hold) that the karst geology beneath the Complex is a point source. To the contrary, the court found that Plaintiffs were "unable to identify the specific sinkholes or other leaking karst features in the Ash Pond Complex in the present day." (RE258, PageID#10526.)

6 Plaintiffs' citation to *U.S. Steel Corp. v. Train*, 556 F.2d 822 (7th Cir. 1977), adds nothing. *U.S. Steel* did not hold that well disposal is a point source discharge, and the Seventh Circuit subsequently held that such wells are subject to RCRA, not the CWA. *Inland Steel Co. v. EPA*, 901 F.2d 1419, 1423-24 (7th Cir. 1990).

Contrary to Plaintiffs' claim (Pls.' Br. 19, 23), the plurality decision in *Rapanos v. United States*, 547 U.S. 715 (2006), does not say otherwise. *Rapanos* expressly "d[id] not decide" the issue of "enforcement of § 1342." *Id.* at 743. Justice Scalia's observation that the statutory text might allow something other than "direct" discharges was predicated on cases where discharges "pass[ed] 'through conveyances'" (i.e., from one point source, to another point source, to navigable waters). *Id.*[7]

Here, the only point sources identified below are the Complex and the NRS. (RE258, PageID##10506, 10509-11.) While the Complex conveys up to 27 million gallons of wastewater per day to the Cumberland River via Outfall 001, there is no claim that this violates the CWA. Instead, Plaintiffs' Complex-related claims are limited to unidentified and unquantified karst-related groundwater seepage. (RE258, PageID#10523.) And the district court found that any pollutants

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[7] *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1146 & n.6 (10th Cir. 2005) (point source to point source to navigable waters); *Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 118 (2d Cir. 1994) (same); *see also United States v. Earth Scis., Inc.*, 599 F.2d 368, 371 (10th Cir. 1979) (identifying an "open ditch between the reserve sump and the Rito Seco Creek as a point source"); *Sierra Club v. Abston Constr. Co.*, 10 E.R.C. 1416, 1419 n.18 (N.D. Ala. 1977) ("the large gullies and ditches which carry the polluted water from the mining sites to Daniel Creek" were not a point source), *rev'd* 620 F.2d 41, 44-45 (5th Cir. 1980) (the conveyance must "be the means by which pollutants are ultimately deposited into a navigable body of water").

would first migrate "through groundwater" before reaching the Cumberland River. (RE258, PageID#10505.)

Plaintiffs concede, as they must, that "the district court did not hold ... that groundwater is a point source." (Pls.' Br. 21.) The district court recognized the impossibility of proving "every twist or turn on the [ground]water's path" to the Cumberland River, thereby acknowledging that groundwater is neither discrete nor confined. (RE258, PageID#10531); *see also Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d at 1140 n.4 ("Groundwater seepage that travels through fractured rock would be nonpoint source pollution, which is not subject to NPDES permitting.").

Likewise, the NRS is not a "conveyance" because this long-closed site has not contained water since 1970 and neither "transports" nor "conveys" pollutants. Rather, the district court found that the cause of pollutant migration was "rainwater vertically penetrating the Site, [and] groundwater laterally penetrating the Site." (RE258, PageID#10521.)[8]

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[8] Plaintiffs cannot conceal their failure to respond to TVA's argument that the NRS is not a point source by lumping the NRS and the Complex together. (Pls.' Br. 20.) TVA has consistently argued that the NRS is not a point source (e.g., RE242, PageID#9708-17), and Plaintiffs' witness conceded that the NRS is not designed to hold liquid (Trial Tr.(Vol. 1), RE234, PageID#8933). *See infra* Part II.A.

In cases involving unpermitted facilities, two circuits recently expanded CWA liability to cover groundwater migration, adopting differing fact-specific standards under different facts (neither CCR sites). *Haw. Wildlife Fund v. Cnty. of Maui*, ___F.3d___, 2018 WL 1569313 (9th Cir. 2018) (wells, dye tracer studies); *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, __F.3d__, 2018 WL 1748154 (4th Cir. Apr. 12, 2018) (ruptured pipeline).[9]

The Ninth Circuit rejected a direct-hydrological-connection test, declining to "read[] two words into the CWA ('direct' and 'hydrological') that are not there." *Maui*, 2018 WL 1569313, at *8 n.3. Yet, it invented its own atextual standard, rewriting the CWA to cover groundwater migration where the pollutants are "fairly traceable" with "more than *de minimis*" levels. *Id.* at *8.

A divided panel of the Fourth Circuit embraced a variant of the "direct hydrologic connection" theory, *Kinder Morgan*, 2018 WL 1748154, at *8, deferring to EPA's now-questioned views. This "fact-specific" standard emphasized: whether pollutants were "traceable … in *measurable quantities*," (supporting liability) or "diluted while passing through a labyrinth of underground tunnel geology" (against liability). *Id.* at *9.

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9 These decisions conflict with decisions from the Fifth and Seventh Circuits. *See Rice v. Harken Exploration Co.*, 250 F.3d 264, 271-72 (5th Cir. 2001); *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994); *see* Chamber Br. at 17-18.

Either circuit's standard requires reversal here. There are no "fairly traceable" pollutants exceeding *de minimis* levels reaching the Cumberland River, much less "measurable quantities" of pollutants from a ruptured pipeline, as in *Kinder Morgan*. *See infra* Part III.A. And a "subsurface labyrinth" lies beneath the Complex. (Kutschke Decl., RE122-4, PageID#4657; Trial Tr.(Vol.3), RE236, PageID#9397 ("indirect matrix flow")); *see also supra* note 8.

B. The CWA's Structure and History Confirm that the Migration of Pollutants Through Groundwater Is Not a Point Source Discharge.

"[S]tatutory language must always be read in its proper context," not in isolation. *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991). As TVA explained, the district court's reading of the CWA conflicts with the broader statutory structure. (TVA Br. 27-28.) Plaintiffs have no response.

Specifically, the CWA requires point source dischargers to obtain an NPDES permit. 33 U.S.C. §§ 1311(a); 1342(a)–(b). The NPDES permitting program, in turn, relies upon effluent limitations monitored and enforced at the point of discharge. *See* 33 U.S.C. § 1362(11); 40 C.F.R. §§ 122.41-122.45. Thus, eighteen State *amici* have urged reversal here because, beyond the "massive expansion of NPDES programs" (Ala. Br. 9), "the degree of precision necessary to draft permits with clear compliance requirements would be nearly impossible to replicate with respect to groundwater discharges" (*id.* 10). And, "Congress

explicitly determined that regulation of ground water be left to the States." (Ala. Br. 4.)[10]

Congress's classification of groundwater pollution as a category of non-point source pollution (TVA Br. 28) confirms its decision to leave regulation of pollutant migration through groundwater "within the purview and jurisdiction of the States" (Ala. Br. 5); *accord Exxon Corp. v. Train*, 554 F.2d 1310, 1322 (5th Cir. 1977). Congress thus enacted provisions like 33 U.S.C. § 1314(f) "to help develop and distribute the basic information and methods needed to cope intelligently with groundwater pollution." *Exxon*, 554 F.2d at 1324.

Finally, like the district court, Plaintiffs fail to address the CWA's legislative history which shows Congress "did not intend to interfere with or displace the 'complex and varied' state jurisdictions over groundwaters" despite the '"essential link between ground and surface waters and the artificial nature of any distinction.'" *Id.* at 1326 (quoting S. Rep. No. 92-414, at 73 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3739); *accord Rice*, 250 F.3d at 271-72. This history shows Congress understood "the importance of groundwater in the hydrological cycle" and "that rivers, streams and lakes themselves are largely supplied with

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10 Tennessee took no position on the hydrologic connection theory. (Tenn. Br. 2 n.2.)

water from the ground" but excluded groundwater migration from coverage. S. Rep. No. 92-414, at 73.

C. The Comprehensive Regulation of Groundwater by the States and Under RCRA Avoids Any Groundwater Loophole.

As Tennessee's amicus brief explains, TDEC does not "regulate groundwater through its NPDES permitting program." (Tenn. Br. 10.) Instead, as exemplified by the NRS, *see infra* at 16-17, "TDEC regulates groundwater under the Tennessee Solid Waste Disposal Act" (Tenn. Br. 10), which includes groundwater monitoring "and corrective-action requirements if groundwater protection standards are violated" (*id.* 11). This RCRA-based approach "insure[s] the reasonable protection of the quality of the ground and *surface waters from leachate contamination*," just as Congress intended. 42 U.S.C. § 6942(c)(1); (*see also* Ala. Br. 14-16).

The CCR Rule governs the operation and closure of CCR units and requires "abatement of future groundwater contamination and any resulting downgradient impacts to surface water." (USWAG Br. 9; *accord* TVA Br. 32-33; Ala. Br. 13-14.) Congress endorsed this regulatory approach by amending RCRA in 2016 to authorize the creation of state permit programs for regulating CCR units commensurate with CCR Rule standards. 42 U.S.C. § 6945(d).

So, reversal of the district court's hydrologic connection holding would not, as Plaintiffs suggest, create a loophole allowing pollutants to migrate through

groundwater free from environmental regulation. Rather, stretching the CWA to cover groundwater migration opens the loophole Congress closed through RCRA. *See* H.R. Rep. No. 94-1491(I), at*4 (1976) ("[T]his legislation *eliminates the last remaining loophole in environmental law* ... and permit[s] the environmental laws to function in a coordinated and effective way."), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6241-42.

For CWA liability purposes, Plaintiffs urge "*the broadest possible definition for point sources.*" (Pls.' Br. 17.) But Plaintiffs' broad reading of the CWA would preclude application of the CCR Rule's groundwater protection measures because RCRA excludes CWA point sources from the RCRA definition of solid waste, 42 U.S.C. § 6903(27). (TVA Br. 32-35; USWAG Br. 10-13.)

To escape this RCRA loophole created by the district court's erroneous CWA interpretation, Plaintiffs argue that RCRA's industrial point source discharge exclusion "applies only to the actual point source discharge."[11] (Pls.' Br. 33.) This argument is unsound. Here, an "actual point source discharge" under the cited regulation would be Outfall 001, which is permitted. But if seeps or leaks to groundwater from the Complex and the NRS also are point source discharges

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11 Because TVA does not rely upon RCRA's anti-duplication provision, 42 U.S.C. § 6905, Plaintiffs' discussion of this provision is irrelevant. (Pls.' Br. 32-33.)

subject to CWA/NPDES permitting, as Plaintiffs assert, they are *a fortiori* "actual point source discharge[s]" under RCRA and thus excluded from RCRA's definition of solid waste. (TVA Br. 34-35.)

To evade the direct conflict between the district court's CWA interpretation and RCRA, Plaintiffs cry waiver. But TVA's statement that it was not asserting CCR Rule compliance as a defense to CWA liability (Resp. Mot. Limine, RE194, PageID#7126), is wholly consistent with TVA's position throughout this litigation that the CWA does not regulate groundwater and that RCRA and the CCR rule regulate closure of CCR units and accompanying groundwater remediation. Explaining how RCRA reveals errors in the district court's statutory analysis is, at most, providing new legal authority in support of a preserved issue. *See, e.g., Leonor v. Provident Life & Acc. Co.*, 790 F.3d 682, 687 (6th Cir. 2015). And because the interplay between RCRA and the CWA presents a purely legal question, this Court may always reach it. *See McFarland v. Henderson*, 307 F.3d 402, 407 (6th Cir. 2002).

D. Plaintiffs Fail to Identify a Clear Congressional Statement to Support the District Court's Erroneous Reading of the CWA.

Where an interpretation of the CWA "invokes the outer limits of Congress' power," it must be supported by "a clear indication that Congress intended that result," especially where the "interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Solid Waste*

Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172-73 (2001); *cf. Util. Air Regulatory Grp. v. EPA*, 134 S.Ct. 2427, 2444 (2014).

Plaintiffs fail to identify any clear statement sufficient to trigger expansion of CWA jurisdiction to groundwater and instead posit that Congress, by failing to amend the CWA, acquiesced in some undefined variant of the hydrologic connection theory adopted by some courts or referenced occasionally by EPA.[12] (Pls.' Br. 28.) But statutory text and structure trump congressional inaction, which "'lacks persuasive significance' in most circumstances," *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S.Ct. 1002, 1015 (2017), including in CWA cases, *Rapanos*, 547 U.S. at 749 (plurality) (expressing "skepticism toward reading the tea leaves of congressional inaction").

Because the clear-statement rule resolves any question regarding Congress's decision to treat groundwater pollution as nonpoint source pollution, *Chevron* deference has no role to play. *SWANCC*, 531 U.S. at 172-73. And *Chevron* deference would be due only to a definitive agency interpretation. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). There is no such formal interpretation here. *See Oconomowoc Lake*, 24 F.3d at 966; *Ky. Waterways*, 2017 WL 6628917, at *11 n.2.

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12 *See* Chamber Br. 7-8 & n.4 (detailing competing standards from courts allowing the hydrologic connection theory).

EPA recently acknowledged this, requesting comment on its earlier informal statements about the "direct hydrological connection" approach. Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water, 83 Fed. Reg. 7126, 7126 (Feb. 20, 2018). Contradicting Plaintiffs' claims of "overwhelming" authority, EPA detailed "the mixed case law" and sought comments "on whether subjecting such [groundwater] releases" to NPDES permitting "is consistent with the text, structure, and purposes of the CWA." *Id.* at 7128.

II. THE INTERRELATED DOCTRINES OF COLLATERAL ATTACK, FAIR NOTICE, AND PERMIT SHIELD SUPPLY AN INDEPENDENT BASIS FOR REVERSAL.

A. Plaintiffs Did Not Respond to TVA's NRS Collateral Attack Argument.

TVA's principal brief highlighted the district court's error of allowing a CWA citizen suit to wage a collateral attack on TDEC's decision to *exclude* the closed, heavily-vegetated NRS from the Permit and instead to continue regulating the NRS as a solid waste site. (TVA Br. 40-43.) Plaintiffs have no response.

Rather, they concede that the NRS "has never been encompassed by an NPDES permit." (Pls.' Br. 43.) Tennessee agrees, explaining that the NRS has never been "subject to NPDES permitting," and that "TDEC regulates the[] NRS ... under the SWDA" because it is a solid waste disposal site. (Tenn. Br. 12 & n.10.) TDEC's regulatory decision that the NRS should be regulated as a solid waste site,

not as a CWA point source, despite the request of environmental groups to do otherwise (Pls.' Br. 7, 45), cannot be collaterally attacked in a citizen suit, particularly when Plaintiff TCWN abandoned its permit appeal on this precise issue (TVA Br. 41). Because Plaintiffs have conceded the collateral attack point, the district court's finding of CWA liability as to the NRS must be reversed.

B. Plaintiffs' Removed Substances and Sanitary Sewer Overflow Arguments Are Circular and Unsupported by TDEC.

Plaintiffs strain to justify the district court's erroneous rulings that TVA violated specific permit provisions. But TDEC never cited TVA for violations, the provisions are facially inapplicable, Tennessee acknowledges that "TDEC does not seek to regulate groundwater through its NPDES permitting program" (Tenn. Br. 10), and TDEC does not endorse the notion of specific permit violations (*see* Trial Tr.(Vol.2), RE235, PageID#9035).

Logically, if Tennessee's NPDES permitting program does not address discharges to groundwater at all, the Permit cannot be read to prohibit them. Allowing specific permit provisions to have a coercive force disclaimed by the regulator would violate fundamental principles of due process and fair notice. *E.g., Wis. Res. Prot. Council v. Flambeau Mining Co.*, 727 F.3d 700, 707 (7th Cir. 2013). These flawed rulings should be reversed.

C. Plaintiffs' Permit Shield Response Does Not Refute the Undisputed Evidence (Ignored by the District Court) that TDEC Reasonably Contemplated Karst-Related Leakage.

The CWA's permit shield, 33 U.S.C. § 1342(k), applies if (1) the discharge at issue is disclosed to the permitting authority during the permitting process, and (2) was within the permitting authority's reasonable contemplation at the time the permit was issued. *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 290 (6th Cir. 2015). In defense of the district court's erroneous permit shield ruling, Plaintiffs offer three arguments; none pass muster.

First, Plaintiffs argue that the permit shield is inapplicable because TVA violated the Permit. (Pls.' Br. 40.) But that cannot be. As TDEC stated in its response to the environmental groups' comments during the permitting process (Permit, RE1-2, PageID#106) and confirmed to this Court (Tenn. Br. 10), TDEC imposed no explicit permitting conditions regulating the migration of pollutants to groundwater. *See Hazard*, 781 F.3d at 285 (The permit shield "insulates permit holders from liability for certain discharges of pollutants that the permit does not explicitly mention.").[13]

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13 Tennessee's position that "[a]ny discharge not identified as authorized by the permit is ... unauthorized" under state law (Tenn. Br. 10) has no bearing on TVA's federal law permit shield argument, and Tennessee does not contend otherwise. *See Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 359 (2d Cir. 1993) ("[S]tate regulations … are not enforceable through a [CWA] citizen suit.").

Second, Plaintiffs insist that the permit shield covers discharges only from identified outfalls. (Pls.' Br. 40-41.) But either the entire Complex is a point source (as the district court held and Plaintiffs claim when interpreting the point source definition) or only Outfall 001 is a point source (as Plaintiffs claim when addressing permit shield or conflict with RCRA). Plaintiffs cannot broaden the definition of point source discharge for liability purposes but narrow it to avoid the statutory consequences. If the entire Complex is a point source, it is covered by the Permit and, therefore, the permit shield.

Third, Plaintiffs claim that TVA did not comply with its disclosure obligations. This is wrong. TVA complied with the applicable disclosure requirements for industrial facilities, 40 C.F.R. § 122.21(a)(2)(i), by submitting EPA Form 2C (Permit Renewal Application, JX135 (App.5) at PDF 33-35). *See also* 40 C.F.R. § 122.21(g) (requiring precise latitude/longitude for outfalls, average flow measurements, and effluent characteristics, etc.). And TDEC knew that "[e]very impoundment that is not [a] lined impoundment is going to have a certain amount of seepage." (Trial Tr.(Vol. 2), RE235, PageID#9020.)

Moreover, the administrative record developed by TDEC when it reissued the Permit confirms TDEC's knowledge and reasonable contemplation of the

potential for karst-related seeps/leaks at the Complex.[14] Evidence of TDEC's reasonable contemplation includes internal TDEC emails from the permit writers (Alexander and Janjic) and TDEC's possession of TVA reports documenting a history of karst-related leakage from the Complex. (TVA Br. 45.) TDEC also documented its decision in the Permit's Addendum to Rationale that "no NPDES permit conditions are established" for "groundwater conditions in the vicinity of the ash pond."[15] (Permit, RE1-2, PageID#106.) At trial, TDEC's Mr. Janjic confirmed that this statement pertained to the Complex. (Trial Tr.(Vol. 2), RE235, PageID#9032.)[16]

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14 Reasonable contemplation can be based on information provided by third parties as part of the administrative permitting record. In *Hazard*, the disclosure of the potential for selenium discharges from a mining site occurred when an environmental group pointed out to the state regulator during the public review of the draft NPDES permit that a United States Geologic Survey study had identified the presence of selenium in Eastern Kentucky coal seams. *See Sierra Club v. ICG Hazard, LLC*, No. 6:11-cv-00148-GFVT-HAI, 2012 WL 4601012, at *2-3, 6 (E.D. Ky. Sept. 28, 2012); Br. Def.-Appellee at 31-34, *Sierra Club v. ICG Hazard, LLC*, No. 13-5086 (6th Cir. Apr. 24, 2013).

15 Plaintiffs' attempt to downplay the significance of the Addendum to Rationale as "non-binding" and merely "explanatory" ring hollow. (Pls. Br. 43.) EPA and TDEC regulations required TDEC to provide the Addendum to Rationale to TVA and to the public, and TDEC published it as part of the final permit document. (TVA Br. 10 & n.10.) No source better describes the scope of TDEC's reasonable contemplation during the permitting process. (Trial Tr.(Vol. 2), RE235, PageID#9027-28.)

16 Plaintiffs' claim (Pls.' Br. 7) that the public comments pertained only to groundwater migration at the NRS is not credible. Their June 2011 letter objected

If "the evidence of the pond's leak-prone construction and history carries the day" and establishes liability (RE258, PageID#10530), then there is no logical reason why documentation of that same history in Stantec's 2009 and 2010 reports (both of which were trial exhibits) would not also establish TDEC's reasonable contemplation when, as Plaintiffs concede, these reports were "circulated among TDEC staff." (Pls.' Br. 47 & n.11.)

Plaintiffs also are conspicuously silent about Mr. Quarles' 2014 public comments objecting to TDEC's decision to allow CCR leachate from a new landfill to be routed to the Complex. (TVA Br. 46.) TDEC responded to these concerns about karst-related leakage from the Complex by stating that "*the reason for plugging any of the sinkholes was to slow down the discharge rate of treated water to surface and subsurface water, not to stop the intended slow discharge*." (Trial Tr.(Vol. 1), RE234, PageID8960.) This statement proves TDEC reasonably contemplated karst-related leakage and made a regulatory decision not to impose any specific permit conditions. *See Hazard*, 781 F.3d at 290 (post-issuance

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to the draft "permit for the Complex" (*id.* 45) because it "fail[ed] to address discharges through seeps and groundwater migration." (JX150 (App.7) at 1.) Their permit appeal reiterated this same challenge. (Appeal Pet., RE13-1, PageID#296, 304.)

evidence can "demonstrate[], by negative implication," the regulator's reasonable contemplation of the discharge at issue).[17]

Williams Pipe Line Co. v. Bayer Corp. shows how the permit shield applies where, as here, an NPDES permit authorizes discharges from a wastewater treatment system via an identified outfall but, when issuing the permit, the regulator also considered the possibility of seepage to groundwater. 964 F. Supp. 1300, 1326-27 (S.D. Iowa 1997). *Williams* held that

> [t]o require a separate permit for each outfall at the swamp would be … at variance with the policy of the legislation as a whole. Apparently, Bayer *is confusing outfall locations with a point source requiring a permit.* ... [W]here Williams already has a permit covering discharge from the swamp, the Court holds *Congress did not intend for seepages from the swamp to require a separate permit.*

Id. at 1326.

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17 Plaintiffs likewise have no answer to TDEC's decision, documented in the Addendum to Rationale (Permit, RE1-2, PageID#106), to assess and monitor the potential effects of any groundwater loadings on the Cumberland River through the biannual Reservoir Fish Assemblage Index. (TVA Br. 47-48); *see also Hazard*, 781 F.3d at 283, 290 (applying the permit shield where the permittee complied with a monitoring requirement imposed by the regulator to address a "potential" discharge).

III. THE FINDING OF SCANT HARM AND THE FAILURE TO BALANCE THE EQUITIES CONFIRM THE DISTRICT COURT'S ABUSE OF DISCRETION.

A. Plaintiffs' Attempt to Ignore the Finding of Scant Harm Does Not Make the Injunction Proper.

Plaintiffs scour the record for every shred of evidence raising even the specter of harm to the Cumberland River, contending that the court's "exhaustive" 123-page opinion "leaves no room" to doubt the propriety of the injunction. (Pls.' Br. 48.) But much of the opinion addresses general hydrogeology principles rather than site-specific evidence, and the weakness of the evidence leaves ample room to question the district court's insistence on closure-by-removal.

Plaintiffs cannot escape that the whole here is less than the sum of its parts. This is a CWA case alleging pollution to navigable waters. Yet, the only evidence about the Cumberland River's health (much of it unmentioned below)—state and federal water quality information, water quality data from local utilities, and biological fish monitoring results[18]—shows that neither environmental nor human health has been impaired by the identified pollutants. Plaintiffs' silence effectively

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18 Plaintiffs claim that the district court "credited evidence" that "[s]elenium contamination is likely bioaccumulating in fish and causing toxicity in aquatic life" (Pls.' Br. 49-50), but fail to mention that the district court found the reliability of their witness's conclusions to be "undermined significantly by the lack of corroborating data ... from the Old Hickory Lake area." (RE258, PageID#10474-75.) TVA's data demonstrate healthy fish populations in the waters surrounding Gallatin. (Permit, RE1-2, PageID#106.)

concedes TVA's point (TVA Br. 55) that any seeps through karst features and groundwater pale in comparison to the discharge approved for Outfall 001—27 million gallons per day—which TDEC concluded does "not cause or contribute to aquatic toxicity" (Permit, RE1-2, PageID#102).

Plaintiffs' refusal to address the district court's scant-harm conclusion cannot make it disappear. Specifically, the court found the record "largely bereft of evidence [from which to] conclude that TVA's violations are particularly severe, in terms of the harm done or the amount of pollutants released" (RE258, PageID#10535); that only the *likelihood* of harm, not *actual* harm, was demonstrated (*id.* (concluding that there was "scant [evidence] of concrete harm beyond mere risk and the presence of pollutants in and of itself"); and that it could not disentangle past pollution from present. (*Id.* PageID#10522 ("[N]one of the science presented was capable of definitively identifying when the relevant pollutants entered the water.").) The district court's radical remedy of complete excavation cannot be squared with these findings.

B. The District Court Failed to Weigh the Financial and Environmental Costs of Closure-by-Removal Against the Protective Benefits of Closure-in-Place Under the CCR Rule.

Plaintiffs argue that the CWA forbids a court from balancing equities, specifically the financial burdens of imposing a particular remedy, and that the district court's "search for possible remedies" resulted in the only solution—

closure-by-removal—that would resolve the issue of CCR leachate migrating through groundwater at Gallatin. (Pls.' Br. 57-59.) Every aspect of that argument is wrong.[19]

The CWA does not erase the district court's inherent equitable authority. (TVA Br. 51-52.) Plaintiffs' insistence that the district court could not consider the financial impact of its injunction on TVA's ratepayers is refuted by the case they cite for that proposition. *United States v. Cundiff* recognized that, but for the defendants' "intentional, flagrant, egregious, and openly defiant" violations, financial impact would "generally ... [be] included as a factor in equity." 555 F.3d 200, 216 (6th Cir. 2009) (internal quotation marks omitted). Here, by contrast, the general rule that cost can and should be considered applies, particularly where the district court found that TVA acted in good faith (RE258, PageID#10536).[20]

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[19] Plaintiffs also argue that the injunction is justified based on TVA's supposed violations of the Permit's removed-substances and sewer-overflow provisions. (Pls.' Br. 62-64.) This argument does not apply to the NRS. And the basis for liability—permit violations versus unauthorized discharges—has no bearing on the district court's obligation to conduct a traditional equitable analysis. *See, e.g., Natural Res. Def. Council v. Texaco Ref. & Mktg., Inc.*, 906 F.2d 934, 941 (3d Cir. 1990).

[20] Plaintiffs claim that TVA's estimates for excavation and removal offsite are "hyperbolic" given post-trial proposed removal plans that included removal onsite. (Pls.' Br. 60.) But removal onsite is still far more expensive than closure-in-place (TVA Br. 57 n.33), and any removal, whether on or offsite, carries with it significant environmental risks (*id.* at 59-61).

Congress charged TVA with providing the residents of the Tennessee Valley region with electric power at the lowest possible rates. 16 U.S.C. § 831j. Any consideration of a remedy must account for those ratepayer concerns, particularly given the scant harm to be remedied and the questionable benefits from closure-by-removal. The district court's superficial observation that the public had a general "right to enjoy the many benefits of the Cumberland River free of any unlawful discharges of pollutants" (RE258, PageID#10537) cannot justify an injunction of this magnitude, particularly where it would have serious implications for residents not only in Tennessee but across TVA's seven-state service territory (*accord* Ala. Br. 21-22, TVPPA Br. 26-31), and where the environmental costs of the district court's remedy may well outweigh any benefits (TVA Br. 59-61).

As to its "search for possible remedies," the district court erroneously failed to consider the effect the CCR Rule would have on the seeps at issue (despite TVA's submission of detailed evidence on this point. (TVA's PFF&CL, RE242, PageID#9761-70 & nn.53-55.) Instead, it concluded that the general

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Amicus Southern Alliance for Clean Energy also attacks TVA's cost estimates (SACE Br. 7), but this Court should decline to consider its arguments which are based on extra-record evidence, including inadmissible evidence of compromise negotiations. *See, e.g.*, *Bormuth v. City of Jackson*, 870 F.3d 494, 501 (6th Cir. 2017) (declining to consider factual evidence presented for the first time on appeal by amicus).

characteristics of the site, its history (RE258, PageID#10539), and unspecified evidence in the record "offer[ed] ample reason to doubt" that anything but closure-by-removal was sufficient (*id.* PageID#10538).

But no evidence established that closure-by-removal was even feasible. Instead, the evidence established that any removal requirement is *less* protective than the closure-in-place option allowed by the CCR Rule. Specifically, the unrebutted testimony of Mr. Lang, the only qualified professional engineer to testify regarding the recognized engineering practices required by the CCR Rule, demonstrated that the risks created by the very features of karst geology that underpinned the district court's liability analysis are best mitigated through closure-in-place.[21] (TVA Br. 58-60.)

Moreover, the district court failed to consider how application of the CCR Rule's closure-in-place requirements would affect groundwater remediation efforts

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[21] Plaintiffs suggest that this Court could uphold the district court's CWA injunction because TDEC's preferred remedy in the state-enforcement action is apparently closure-by-removal. (Pls.' Br. 61-62.) But Tennessee's amicus brief is the first notice TVA has received, in any forum, as to the State's proposed final corrective-action decision for Gallatin. Because Tennessee's position here is based on its analysis of state requirements in an ongoing state action and premised on a one-sided view of untested evidence never presented to the district court, it should not be considered. *See, e.g.*, *Bormuth*, 870 F.3d at 501. As Tennessee acknowledges (Tenn. Br. 15-16 n.14), TVA can contest TDEC's "determination" once it is asserted in the state-court action. TVA intends to do so.

at Gallatin. Mr. Lang testified that TVA's certified plan for closure-in-place is sufficient to address any groundwater migration issues at Gallatin (TVA Br. 59-60), a determination that accords with EPA's own findings regarding the risk of leachate migration to groundwater from dewatered CCR surface impoundments. *See* CCR Rule, 80 Fed. Reg. 21,302, 21,342 (Apr. 17, 2015).[22] And the CCR Rule makes clear that closure-in-place of coal ash sites is a far more comprehensive remedy than slapping a cap on an otherwise leaky structure, as the district court's analysis might suggest (RE258, PageID#10538-39). *See* 40 C.F.R. § 257.102(b)(1)(iii), (d)(1)(i); § 257.103(c)(2)(i)-(ii); *see also* JX190 (App.25) §§ 2.10.1., 2.10.3 (outlining TVA's closure plans). Nor is closure-in-place a cap and walk-away enterprise; instead, it involves an extensive thirty-year monitoring period and stringent corrective action requirements if groundwater problems arise. *See* 40 C.F.R. §§ 257.90(a), 257.96(a), 257.104(c)(1).

In sum, "[t]he public interest will not be served" by the drastic injunctive relief imposed by the district court's order to excavate and remove 13.8 million cubic yards of coal ash, an unproven remedy that is unsupported by any engineering analysis and is vastly more expensive than the alternative. *Sierra Club*

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22 The NRS is not subject to the CCR Rule because TVA dewatered and closed the site before the Rule's effective date. *See* 80 Fed. Reg. 21,343 (Apr. 17, 2015). But the NRS is subject to RCRA, and TVA's plans for remediation at the NRS to cut off infiltration of the site by rainwater and groundwater are based on TVA's CCR Rule plans for the Complex. (RE258, PageID#10482.)

v. Va. Elec. Power Co., 247 F. Supp. 3d 753, 764-65 (E.D. Va. 2017) (refusing to order the excavation of a CCR site holding one-fifth the volume of CCRs stored at Gallatin), *argued*, No. 17-1952 (4th Cir. Mar. 21, 2018).

The district court's incomplete analysis—accepting Plaintiffs' alarmist claims that closure-in-place is not sufficiently protective without appropriate "regard [to] the public consequences in employing the extraordinary remedy of injunction," *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 312 (1982)—was an abuse of discretion. *See Winter v. Natural Res. Def. Council*, 555 U.S. 7, 26-27 (2008). At a minimum, TVA's ratepayers, the nine million people in the seven-state Tennessee Valley region, deserve a careful balancing of the equities.

CONCLUSION

For the foregoing reasons and as set forth in TVA's principal brief, the judgment of the district court should be reversed. Alternatively, the district court's injunction should be vacated and the case remanded for the district court to reconsider whether an injunction should issue.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,472 words excluding the parts of the brief exempted by Fed. R. App. P. 32(f), and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Word 2010 in Times New Roman (14 point) proportional type.

s/David D. Ayliffe
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CERTIFICATE OF SERVICE

I certify that on April 12, 2018, the foregoing document was electronically filed and served by operation of the Court's CM/ECF system on the following attorneys of record for Plaintiffs-Appellees in this matter:

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ADDENDUM
APPELLANT'S DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record Entry	Date	Document Description	Page ID # Range
RE1-2	Jun. 26, 2012	NPDES Permit No. TN0005428	57-157
RE13-1	Aug. 3, 2012	Amended Petition for Statutory Appeal (Tenn. Bd. of Water Quality)	279-306
RE122-4	Feb. 3, 2016	Expert Opinion of Walter G. Kutschke, PhD, PE	4621-4667
RE194	Jan. 6, 2017	TVA's Response in Opposition to Plaintiffs' to Motion in Limine No. 1 to Exclude Evidence Regarding the Federal Coal Combustion Residual Rule	7121-7129
RE234	Jan. 30, 2017	Trial Transcript, Vol. 1	8742-8972
RE235	Jan. 31, 2017	Trial Transcript, Vol. 2	8973-9196
RE236	Feb. 1, 2017	Trial Transcript, Vol. 3	9197-9407
RE242	Apr. 14, 2017	Proposed Findings of Fact and Conclusions of Law (Post-Trial) by Tennessee Valley Authority	9627-9772
RE242-3	Apr. 14, 2017	Attachment 3, Proposed Findings of Fact and Conclusions of Law (Post-Trial) by Tennessee Valley Authority	9857-9860
RE258	Aug. 4, 2017	Findings of Fact and Conclusions of Law, *Tenn. Clean Water Network v. TVA*, ___ F. Supp. 3d ___, 2017 WL 3476069 (M.D. Tenn. Aug. 4, 2017).	10420-10542

Message

From: Ayliffe, David Demar [ddayliffe@tva.gov]
Sent: 1/30/2018 9:19:11 PM
To: Fotouhi, David [Fotouhi.David@epa.gov]
Subject: FW: 17-6155 Tennessee Clean Water Network, et al v. TVA "appellant brief"
Attachments: Brief of Defendant-Appellant TVA, No. 17-6155 (6th Cir.) (as filed Jan. ....pdf

David – attached is a copy of TVA's appellate brief filed earlier this afternoon.

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To: Ayliffe, David Demar
Subject: 17-6155 Tennessee Clean Water Network, et al v. TVA "appellant brief"

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United States Court of Appeals for the Sixth Circuit

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Case Name:	Tennessee Clean Water Network, et al v. TVA
Case Number:	17-6155
Document(s):	Document(s)

Docket Text:
APPELLANT BRIEF filed by Mr. David Demar Ayliffe for TVA. Certificate of Service:01/30/2018. Argument Request: requested. [17-6155] (DDA)

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c522aa0f65fb1b6ebf76dcb228b334e4e37]]

No. 17-6155

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TENNESSEE CLEAN WATER NETWORK;
TENNESSEE SCENIC RIVERS ASSOCIATION

Plaintiffs-Appellees,

v.

TENNESSEE VALLEY AUTHORITY,

Defendant-Appellant.

On Appeal from the United States District Court for the
Middle District of Tennessee, Nashville Division

BRIEF OF DEFENDANT-APPELLANT TENNESSEE VALLEY AUTHORITY

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CORPORATE DISCLOSURE STATEMENT

The Tennessee Valley Authority ("TVA") is an executive branch corporate agency and instrumentality of the United States created by and existing pursuant to the Tennessee Valley Authority Act of 1933, 16 U.S.C. §§ 831–831ee. TVA is wholly owned by the United States as evidenced by the TVA Act; TVA has no parent corporation and has no stock certificates.

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